FILED
NOV 9 1992
OFFICE OF THE CLERK

No. 92-6281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

R. PAUL VAN DAM
Attorney General of Utah
JAN GRAHAM
Utah Solicitor General
DAVID B. THOMPSON
Assistant Attorney General
MICHAEL M. QUEALY
(Counsel of Record)
Assistant Attorney General
1636 West North Temple
Suite 300
SALT LAKE CITY UT 84116
(801) 538-7227

--Attorneys for Respondent--

No. 92-6281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR CERTIORARI

R. PAUL VAN DAM
Attorney General of Utah
JAN GRAHAM
Utah Solicitor General
DAVID B. THOMPSON
MICHAEL M. QUEALY
(Counsel of Record)
Assistants Attorney General
1636 West North Temple
Suite 300
SALT LAKE CITY UT 84116
(801) 538-7227

--Attorneys for Respondent--

QUESTION PRESENTED

1. In light of conflicting decisions by the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit, whether the language of the Uintah Act of May 27, 1902 (32 Stat. 245), as amended, providing that the unallotted lands of the original Uintah Indian Reservation shall be restored to the public domain, constituted clear language of disestablishment, as this Court has recognized, so as to confer criminal jurisdiction upon the State of Utah over offenses involving Indians within the area so restored to the public domain.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Preface 2

B. Prior Proceedings on Uintah Reservation Boundaries 2

C. Statement of Facts -- State v. Hagen 5

D. Statement of Facts -- State v. Perank 6

REASONS FOR GRANTING THE WRIT 8

I. The Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit Have Issued Conflicting Decisions on an Important Issue of Federal Law 8

II. The Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit Have Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court 13

A. The Tenth Circuit Misread Solem and Rendered a Decision in Conflict with the Decisions of this Court and of Lower Federal Courts 16

B. The Decisions of the Utah Supreme Court in Hagen/Perank Applied the Correct Analytical Test Set Forth in Solem 24

CONCLUSION 26

APPENDIX:

Appendix A: Opinion of the Utah Supreme Court in State v. Hagen ..... ia

Appendix B: Opinion of the Utah Supreme Court in State v. Perank 4a

Appendix C: Opinion of Tenth Circuit Court of Appeals en banc in Ute Indian Tribe v. Utah . 76a

Appendix D: Congressional Acts and Presidential Proclamations 138a

Appendix E: Record Stipulation in Hagen/Perank 163a

TABLE OF AUTHORITIES

CASES CITED:

Bardon v. Northern Pacific Railroad Co., 145 U.S. 535 (1892) 23

Barker v. Harvey, 181 U.S. 481 (1901) 24

Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967) 22

Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, Mem. 431 U.S. 901 (1977) 2, 3, 9, 10, 15, 26

DeCoteau v. District County Court, 420 U.S. 425 (1975) 11, 14, 17, 18

DeMarrias v. South Dakota, 319 F.2d 845 (8th Cir. 1963) 22

Gibson v. Anderson, 131 Fed. 39 (9th Cir. 1904) . . . 23

Hanson v. United States, 153 F.2d 162 (10th Cir. 1946) 11

Hastings and Dakota Railroad Co. v. Whitney, 132 U.S. 357 (1889) 23

Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fe R.R. Co., 13 Fed. 106 (D. Kan. 1881) 23

Lafferty v. State, 125 N.W.2d 171 (S.D. 1963) 23

Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733 (1875) 23

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) 23

Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984) 23

Mattz v. Arnett, 412 U.S. 481 (1973) 14, 17, 18

Pittsburg & Midway Coal Mining Company v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990) . . 21, 22, 24, 25

Putnam v. United States, 248 F.2d 292 (8th Cir. 1957) 23

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) . . . . . passim

Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980) Hoffman, J., dissenting), cert. denied, 451 U.S. 908 (1981) 22, 23

Seymour v. Superintendent, 368 U.S. 351 (1962) 14, 17, 18

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) 24

Solem v. Bartlett, 465 U.S. 463 (1984) ..... passim

Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910) 11

Spalding v. Chandler, 160 U.S. 394 (1896) 23

Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977) .. 23

State v. Hagen, 191 Utah Adv. Rep. 26 (1992) . passim

State v. Perank, 191 Utah Adv. Rep. 5 (1992) .. passim

U.S. v. Boss, 160 Fed. 132 (D. Utah 1906) 11

U.S. v. Pelican, 232 U.S. 442 (1914) 18, 19

United States ex rel Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977) 23

United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) 22, 23

United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), rev'd, 420 U.S. 425 (1975) .. 22

United States v. Payne, 8 Fed. 883 (W.D. Ark. 1881) 23

United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976) 23

United States v. Tichenor, 12 Fed. 415 (D. Ore. 1882) 23

Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D.C. Utah 1981) 4, 13, 16

Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (1983) 4, 16

Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (en banc) (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) ..... passim

Ute Indian Tribe v. State Tax Commission of Utah, 574 F.2d 1007 (10th Cir. 1978), cert. denied, 439 U.S. 965 (1978) 9

Whiterocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914) 11

Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839) 23

Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 23

STATUTES CITED:

18 U.S.C. § 1151 5

24 Stat. 388, General Allotment Act of 1887 (Dawes Act) 14

25 Stat. 896, § 21 18

28 U.S.C. § 1257(a). 1

32 Stat. 245, Act of May 27, 1902
(Uintah Act) ..... i, 1, 6, 8, 14, 25

32 Stat. 982, Act of March 3, 1903 1

33 Stat. 189, Act of April 21, 1904 1

33 Stat. 1048, Act of March 3, 1905 1

35 Stat. 464, § 9 19

MISCELLANEOUS AUTHORITIES CITED:

F. Hoxie, Jurisdiction on the Cheyenne River Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 87 (undated) 21

Felix Cohen, Handbook of Federal Indian Law, pp. 34-44 (1982 ed.) 5

Presidential Proclamation of 1906, 34 Stat. 3228 ... 26

Presidential Proclamation of July 14, 1905, 34 Stat. 3119, III Kapp. 605 (1913) 1, 25

Rules of U.S. Supreme Court, Rule 14(k)(ii) 7

OPINIONS BELOW

The opinion of the Utah Supreme Court in State v. Hagen is reported at 191 Utah Adv. Rep. 26 (1992) (Resp. App. A, p. 1a). The opinion of the Utah Supreme Court in the companion case of State v. Perank is reported at 191 Utah Adv. Rep. 5 (1992) (Resp. App. B, p. 4a). The opinion of the U.S. Court of Appeals for the Tenth Circuit en banc in Ute Indian Tribe v. State of Utah is reported at 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) (Resp. App. C, p. 76a).

JURISDICTION

The judgment of the Utah Supreme Court was entered on July 17, 1992. No rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The relevant statutes and presidential proclamations relating to the Uintah Reservation are reprinted in our appendix as Appendix D (beginning at Resp. App., p. 138a). The Act of May 27, 1902 (32 Stat. 245, 263), as amended, is reprinted at Resp. App. D, p. 138a. The Act of March 3, 1903 (32 Stat. 982, 997-998) is reprinted at Resp. App. D, p. 142a. The Act of April 21, 1904 (33 Stat. 189) is reprinted at Resp. App. D, p. 145a. The Act of March 3, 1905 (33 Stat. 1048, 1069-70) is reprinted at Resp. App. D, p. 145a. The Presidential Proclamation of July 14, 1905, 34 Stat. 3119, III Kapp. 605 (1913) is reprinted at Resp. App. D, p. 155a.

STATEMENT OF THE CASE

A. Preface

The jurisdictional boundaries of the Uintah Indian Reservation have been the subject of litigation, uncertainty and conflict for more than fifteen years. The State of Utah prevailed in the Utah Supreme Court; nonetheless, the State of Utah supports the granting of certiorari in this case. This Court should resolve the conflicting decisions between the state and federal courts on this issue. A final resolution of this controversy is essential for federal, state and tribal law enforcement officials, and for the Indian and non-Indian citizens of northeastern Utah.

B. Prior Proceedings on Uintah Reservation Boundaries

In 1977, the question of the status of the Uintah portion of the Uintah and Ouray Indian Reservation was considered by the Utah Supreme Court in Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, Mem. 431 U.S. 901 (1977), a civil action arising out of an auto accident. The Utah Supreme Court ruled that the original Uintah Reservation had ceased to exist, but did so without detailed analysis or discussion. Pursuant to a petition for a writ of certiorari, and at the suggestion of the United States, this Court vacated that judgment and remanded the case for further consideration of the boundary issue in light of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). Brough, 431 U.S. 901 (1977). The Utah Supreme Court then remanded the case to the trial court to take evidence on the status of the reservation. However, upon

remand, the Indian defendant removed the action to federal district court. Brough was ultimately dismissed without any resolution of the boundary issue as per the instructions of this Court.

In the meantime, the reservation boundary issue surfaced in another action then pending in the United States District Court for Utah. After enacting an expansive Law & Order Code in 1975, the Ute Indian Tribe sought a declaratory judgment that its Code was effective within the historic boundaries of the original Uintah and Uncompahgre Reservations.[1] The State of Utah, Duchesne and Uintah Counties, and several local municipalities lying within those original boundaries were defendants. A full trial was held and a voluminous record as to the history of the opening of the reservation was developed. In that case there was never any dispute that all Indian allotments and other land set aside and held in trust for the Ute Tribe (trust lands) were still part of the reservation. The controversy there, as here, involved the status of the patented fee lands which were opened by Congress to non-Indian settlement.

The federal district court held that the Uncompahgre Reservation had been completely disestablished but that the Uintah Reservation had been only partially diminished by the acts of Congress opening the respective reservations to non-Indian settlement. The district court held that large areas of non-Indian land were still within

---

[1] The old Uncompahgre Reservation--while addressed in the federal litigation--is not directly at issue here, since Petitioner Hagen's crime was committed within the original boundaries of the Uintah Reservation.

the boundaries of the Uintah Reservation. Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D.C. Utah 1981).

On appeal, a panel of the Tenth Circuit Court of Appeals affirmed the lower court's determination that certain parts of the Uintah Reservation and all of the Uncompahgre Reservation had been disestablished. Moreover, the panel reversed as to the non-Indian lands within the opened portion of the Uintah Reservation, and held that reservation status had ended with respect to those lands when they were restored to the public domain and opened up to settlement. Thus, the panel held that the present-day reservation consisted of only the "trust lands." Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (1983).[2]

The Ute Tribe petitioned for rehearing, and after this Court's decision in Solem v. Bartlett, 465 U.S. 463 (1984), the Tenth Circuit Court granted rehearing en banc. The en banc court, with two judges dissenting, vacated the decision of the panel and, invoking Solem, held that both the original Uintah and Uncompahgre Reservations still exist undiminished (except for two small areas not at issue here). Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985) (hereinafter referred to as Ute Indian Tribe). The State and local entities petitioned this Court for a writ of certiorari, which was denied. Utah v. Ute Indian Tribe, 479 U.S. 994 (1986).

---

[2] The holding of the original Tenth Circuit Court panel is consistent with the result reached by the Utah Supreme Court in both Hagen and Perank.

C. Statement of Facts -- State v. Hagen

Petitioner Robert P. Hagen was charged in state district court for Duchesne County, Utah, with distribution of a controlled substance, a third degree felony under Utah law. On August 28, 1989, Petitioner pleaded guilty to the charges. The offense occurred in the Town of Myton, which is within the original exterior boundaries of the Uintah Reservation as defined by the en banc decision of the Tenth Circuit Court. Ute Indian Tribe, 773 F.2d 1087. The Town of Myton, however, is not located on Indian-owned "trust lands", but lies within the area which was restored to the public domain and opened to non-Indian settlement.[3]

Prior to sentencing, Petitioner filed a motion to arrest judgment claiming that, since he was an Indian and the crime took place within the exterior boundaries of an Indian reservation, the state court lacked jurisdiction. See 18 U.S.C. § 1151. The trial court denied the motion.

On appeal, the Utah Court of Appeals reversed, holding that Petitioner was an Indian and that Myton was within the exterior boundaries of the Uintah Reservation

---

[3] The terms "Indian country" and "Indian reservation" are often used interchangeably, and refer to the area--regardless of land ownership--within the exterior boundaries of an Indian reservation. The term "trust lands" refers to lands held in trust by the United States for the exclusive use and occupation of Indians or Indian tribes. See generally Felix Cohen, Handbook of Federal Indian Law, pp. 34-44 (1982 ed.). Thus, Indian country or an Indian reservation, with attendant jurisdictional ramifications, can (depending on the situation) include non-Indian land located within the exterior boundaries of a reservation.

based on the en banc decision of the Tenth Circuit Court in Ute Indian Tribe, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986). State v. Hagen, 802 P.2d 745 (Utah App. 1990).

The Utah Supreme Court then granted the State's petition for a writ of certiorari, and on July 17, 1992, issued its decision reversing the Utah Court of Appeals. Based on its decision the same day in State v. Perank (discussed infra), the Utah Supreme Court disagreed with the Tenth Circuit Court's decision in Ute Indian Tribe and ruled that the restoration to the public domain of unallotted and unreserved lands within the Uintah Reservation pursuant to the Act of May 27, 1902, as amended, diminished the reservation; that the Town of Myton was not within the present boundaries of the Uintah Indian Reservation; and that the state court had criminal jurisdiction over Petitioner. See Resp. App. B, p. 2a.

Petitioner Hagen filed a timely petition for certiorari with this Court, which was received by this Respondent on October 19, 1992.

D. Statement of Facts -- State v. Perank

A discussion of State v. Perank is included because it is a companion case to and was decided on the same day as Hagen. The opinion in Perank (Resp. App. B, p. 4a) provides the detailed analysis by the Utah Supreme Court regarding the disestablishment of the Uintah Reservation and was cited by that court as controlling

authority in State v. Hagen.[4] The Perank case was under advisement at the time the Hagen case reached the Utah Supreme Court.

In 1983, Clinton Perank--who claimed to be a Ute Indian--was charged in state district court with burglary in the Town of Myton (the same situs as Petitioner's crime), a third degree felony under Utah law. Mr. Perank pleaded guilty to the charges and was placed on probation on October 27, 1983. In 1986, after several probation violations, proceedings were initiated to revoke Mr. Perank's probation and execute the sentence previously entered by the state district court.

A probation revocation hearing was held in April of 1986. At that hearing, Mr. Perank--for the first time in any of the proceedings--asserted that the state district court lacked jurisdiction over him because he was a Ute Indian and the crime took place within the original exterior boundaries of the Uintah Reservation. Mr. Perank relied solely on the en banc decision of the Tenth Circuit Court (Ute Indian Tribe, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986)) for the proposition that the original boundaries of the Uintah Reservation remained intact. The state district court rejected those claims and executed Mr. Perank's prison sentence.

On appeal, Mr. Perank and the State of Utah stipulated that--as to the reservation boundary issue--the record to be considered should be the same record generated in federal district court in Ute Indian Tribe (Resp. App. E, p. 163a). A similar stipulation has been

---

[4] See Rule 14(k)(ii), Rules of U.S. Supreme Court.

executed in State v. Hagen (Resp. App. E, p. 164a). A copy of the record in the federal proceedings was filed in and accepted by the Utah Supreme Court. At the suggestion of the State of Utah, the Utah Supreme Court invited the Ute Tribe to file an amicus curiae brief, and also invited the United States to do the same. Both the Tribe and the United States submitted briefs. See Resp. App. B, pp. 6a-7a.

The Utah Supreme Court held that the Uintah Reservation had been diminished by the Act of Congress of May 27, 1902 (32 Stat. 245), as amended, which restored the unallotted lands within the reservation to the public domain; that the en banc decision of the Tenth Circuit Court in Ute Indian Tribe misinterpreted this Court's decision in Solem v. Bartlett, 465 U.S. 463 (1984), and that the Town of Myton was not within an Indian reservation. Therefore, the Utah Supreme Court concluded the state district court had criminal jurisdiction over Mr. Perank. See Resp. App. B, pp. 62a-63a.[5]

REASONS FOR GRANTING THE WRIT

I. The Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit Have Issued Conflicting Decisions on an Important Issue of Federal Law

[5] For whatever reason, Perank has decided not to join Hagen in seeking a writ of certiorari.

This is the third time since 1977 that the issue of whether the Uintah Reservation was diminished or left intact by its opening has been before this Court on a petition for writ of certiorari.[6] The issue will continue to spawn controversy, uncertainty, and repeated litigation until this Court resolves the conflict. For that reason, the State of Utah agrees with Petitioner that a writ of certiorari should issue to review the decision of the Utah Supreme Court.[7]

In Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated Mem. 431 U.S. 901 (1977), this Court granted certiorari, but summarily remanded the case for further consideration in light of Rosebud. Brough was removed to federal court without the Utah Supreme Court having had the opportunity to reconsider the issue.

[6] Actually, it is the fourth time, if one includes the petition for certiorari filed by the Ute Tribe in Ute Indian Tribe v. State Tax Commission of Utah, 574 F.2d 1007 (10th Cir. 1978), cert. denied, 439 U.S. 965 (1978). That case involved whether State sales taxes could be imposed on sales to non-Indians of products made by a tribal enterprise within the reservation boundaries. While the case turned primarily on tax principles, the lower court had ruled that the original reservation boundaries remained intact. On appeal, the Tenth Circuit reversed, holding that the record before the lower court lacked sufficient evidence for the court to determine the boundary issue. In seeking a writ of certiorari, the Ute Tribe specifically raised the boundary issue in its petition. See Ute Tribe's Petition for Certiorari, U.S. Supreme Court No. 78-292, Issues Presented for Review.

[7] While the State agrees with Petitioner that certiorari should be granted, the State will obviously take a position contrary to Petitioner on the merits.

In Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986), the United States filed an amicus curiae brief urging denial of certiorari, but conceded that the Utah courts might again be called upon to consider the boundary issue:

> The Utah Supreme Court did render a decision almost a decade ago that seemed to assume that these lands were no longer part of the Reservation [citing Brough]. But this Court, at the urging of the United States, vacated that decision and remanded for further consideration in light of Rosebud [citation omitted], and as petitioners concede . . . the diminishment issue was not resolved on remand. If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the intervening decision in Solem and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review.

(Emphasis added.)[8]

The Utah Supreme Court--faced with a challenge to state court criminal jurisdiction in the disputed area of the Uintah Reservation in Hagen and Perank--has now revisited the issue. In deciding the boundary issue in Hagen and Perank, the Utah Supreme Court had before it virtually the identical record that was before the Tenth Circuit Court in Ute Indian Tribe (Resp. App. E, pp. 163a-165a). The Utah Supreme Court also fully considered the decisions of this Court in Rosebud, Solem, and preceding reservation disestablishment cases. However, the Utah Supreme Court reached a result opposite that of the Tenth Circuit Court of Appeals. Only this Court can resolve the present conflict.[9]

In both DeCoteau v. District County Court, 420 U.S. 425 (1975), and Solem v. Bartlett, 465 U.S. 463 (1984), this Court granted certiorari to resolve conflicting decisions regarding Indian reservation boundaries issued by the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit. This Court affirmed the decision of the South Dakota Supreme Court regarding the Lake Traverse Reservation in DeCoteau, and affirmed the decision of the Eighth Circuit Court regarding the Cheyenne River Reservation in Solem.

We agree with Petitioner that the current conflict between the Utah Supreme Court and the Tenth Circuit Court of Appeals regarding the boundaries of the Uintah Reservation--absent a definitive ruling by this Court--will continue to generate uncertainty, confusion and litigation

---

[8] Brief for the United States as amicus curiae at pp. 14-15 in State of Utah v. Ute Indian Tribe, U.S. Supreme Court No. 85-1821 (November 1986). It would seem logical, because a conflict between the courts now exists, that the United States would now support a final resolution of the conflict by this Court.

[9] Prior to 1977, there were other state and federal cases dealing with the opening of the Uintah Reservation. See, e.g., Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910); Whiterocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914); U.S. v. Boss, 160 Fed. 132 (D. Utah 1906); and Hanson v. United States, 153 F.2d 162 (10th Cir. 1946).

within a large area of northeastern Utah. See: Petition, p. 9. The jurisdictional conflicts affect federal, state, local and tribal governments and the approximately 20,000 Indian and non-Indian residents of the area.[10] Without a final determination of reservation boundaries, controversies will continue to arise as to law enforcement, state and tribal court civil jurisdiction, hunting and fishing rights, authority to levy and collect taxes, zoning regulation, environmental regulation, and the control of alcohol and gaming--just to name a few. Absent a decision by this Court, there will be continuing jurisdictional gridlock.

The conflict over the reservation boundaries and the attendant jurisdictional ramifications are not imagined or hypothetical. They are very real indeed. For example, crimes are being committed, on a fairly regular basis, within the area in controversy by or against Indians. The conflicting federal and state court decisions create forum shopping--where criminal defendants charged in state court claim they should be in federal court, and vice versa. More ominously, on or about July 31, 1992 (a mere two weeks after the Perank/Hagen decisions were issued), the Ute Indian Tribe filed a renewed motion for injunctive relief in the United States District Court for Utah, seeking, inter alia, to enjoin the Utah Supreme Court from enforcing its decisions in Perank and Hagen (U.S.D.C. Utah No. C-75-408J). This places the federal district court for Utah and the Utah Supreme Court on a direct collision course, which will be avoided if this Court agrees to grant review. The State of Utah is sensitive to

[10] At least 18,000 non-Indians live within the historic reservation boundaries. The present number of enrolled Ute tribal members is estimated at 1,500 (Resp. App. B, p. 15a, n10).

the pressures placed on this Court's docket, but only a decision by this Court can diffuse the present volatile situation on the Uintah Reservation and between the state and federal courts in Utah.

Further, the conflicting decisions of the Utah Supreme Court and the Tenth Circuit Court of Appeals provide the best opportunity for this Court to review the reservation boundary issue. Both cases were decided on the same extensive record regarding the reservation boundary, which was generated at the federal trial court level in Ute Indian Tribe (Resp. App. E, pp. 163a-165a) (see 521 F. Supp. 1072). Both courts, in considering the same record, reached different results. The extensive record below may very well go by the wayside if the boundary issue is not resolved in the petition now before this Court.

Because the decisions of the Utah Supreme Court and the Tenth Circuit Court of Appeals are in direct conflict on the same issue of federal law, this Court should grant the Petition for a Writ of Certiorari in order to resolve the important question presented.

II. The Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit Have Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court

The question presented in this Petition involves the jurisdictional status of the lands within the Uintah Indian

Reservation which were opened to settlement by the Act of May 27, 1902 (32 Stat. 245), as amended (Resp. App. D, pp. 138a-140a).[11]

As this Court has held, some surplus land acts diminished reservations (see, e.g.,Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v District County Court, 420 U.S. 425 (1975)). Others did not (see, e.g., Solem v. Bartlett, 465 U.S. 463 (1984); Mattz v. Arnett, 412 U.S. 481 (1973); and Seymour v. Superintendent, 368 U.S. 351 (1962)). Solem, 465 U.S. at 468-70. Accord: Perank, supra (Resp. App. B, pp. 16a-18a).

The importance of any diminishment decision is clear. A certain area must lie either within the jurisdiction of state courts or within the jurisdiction of federal and tribal courts. That determination is of critical importance to the general public, tribal members and law enforcement personnel.

In its disestablishment decisions, this Court has set forth a "fairly clean analytical structure" for distinguishing those surplus lands acts that of their own force effected an immediate diminishment of a particular reservation from those acts that simply permitted non-Indians to purchase land within an existing reservation--and left to another day the actual redrawing of the boundaries. Solem, 465 U.S. at 470. Since most disestablishment cases are often legally

[11] The 1902 Act is part of a series of acts of Congress which opened Indian reservation land to settlement by non-Indians. These specific acts effectuated the general policy guidelines set forth in the General Allotment Act of 1887, 24 Stat. 388, commonly known as the Dawes Act.

and factually complex, it is important that lower courts, both state and federal, faithfully apply the "clean analytical" test reiterated by this Court in Solem. A close reading of the opinions of the Utah Supreme Court in the Hagen and Perank cases demonstrates that that Court followed the correct test and, we submit, reached the correct result. On the other hand, the en banc decision of the Tenth Circuit Court of Appeals in Ute Indian Tribe misread Solem, applied the wrong test, and reached the wrong result.

We submit that the very reason this Court summarily vacated the 1977 Utah Supreme Court decision in Brough (at the urging of the United States) was because the Utah Supreme Court had not analyzed the issue with proper reference to the precedents of this Court. Now, the tables are turned and the Tenth Circuit Court has blinded itself to the clean analytical test by its misreading of Solem.

The en banc decision of the Tenth Circuit Court in Ute Indian Tribe sent a message that the analytical test for disestablishment cases was somehow changed by Solem. The Petition now before the Court provides an opportunity for this Court to reaffirm the "clean analytical" test of its prior disestablishment cases, and to correct any misinterpretations created by the Tenth Circuit Court's misreading of Solem.[12]

[12] Such a clarification from this Court is important regardless of how the Court rules on the merits of the Uintah Reservation question. Even if this Court should conclude that the Uintah Reservation was not diminished, it should correct the analytical errors contained in the Ute Indian Tribe decision.

A. The Tenth Circuit Misread Solem and Rendered a Decision in Conflict with the Decisions of this Court and of Lower Federal Courts

1. The en banc decision of the Tenth Circuit Court that the historic Uintah Reservation was not disestablished rests on the proposition that restoration to public domain language "is not the same as a congressional state of mind to disestablish," and hence, "does not reliably establish the clear and unequivocal evidence of Congress's intent to change the boundaries" (Resp. App. C, pp. 86a-87a) (emphasis added). In so holding, the majority acknowledged that this had not been the law prior to Solem and, indeed, all of the judges who had considered this case before Solem agreed that such language was synonymous with disestablishment. See Ute Indian Tribe v. State of Utah, 716 F.2d 1298, 1302 (10th Cir. 1983); id. at 1316 (Doyle, J., dissenting); and Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072, 1122 (D.C. Utah 1981). To the en banc majority, however, Solem altered this long-standing principle of interpretation and marked a new direction in this Court's view of turn-of-the-century legislation concerning Indian reservations. Thus, the en banc majority concluded that "[u]nder the Solem standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question" (Resp. App. C., p. 83a).[13]

[13] To the extent that the Uncompahgre documentation is viewed in pari materia, it both re-enforces the position of the Utah Supreme Court and undermines the rationale and conclusion of Ute Indian Tribe. On this point the United States agrees with us. The United States told this Court that: "In the end, however, the court of appeals' analysis [on Uncompahgre] is unconvincing . . . the court of appeals erred in holding that the Uncompahgre Reservation was not disestablished. . . ." Brief for the United States as Amicus Curiae at 18, 20, Utah v. Ute Indian Tribe, U.S. Supreme Court No. 85-1821 (November 1986). See n.1, supra, at p. 3.

The Tenth Circuit's reading of Solem is not correct. Solem did not establish new "standards" and it did not alter the principles announced in Seymour, Mattz, DeCoteau and Rosebud, which the Court in Solem described as having "established a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase lands within established reservation boundaries." 465 U.S. at 470. Although the Court has added several relevant factors to the traditional indicia of legislative intent, including how Congress and the Department of the Interior have treated the area in later years and whether the area has "lost its Indian character" because it is "predominately populated by non-Indians" (Solem, 465 U.S. at 471 & n.12), the Court has not departed from the governing principle "that congressional intent will control" (Rosebud, 430 U.S. at 586; Solem, 465 U.S. at 470-71).

In determining whether an Indian reservation exists, one must therefore first examine the face of the relevant legislation. Rosebud, 430 U.S. at 587. In each of the disestablishment cases decided before Solem, the Court expressly acknowledged that restoration to public domain constitutes firm and unequivocal language of disestablishment. See Rosebud, 430 U.S. at 589 & n.5; DeCoteau, 420 U.S. at 426-27, 446; Mattz, 412 U.S. at 504 n.22;

Seymour, 368 U.S. at 354-55; and U.S. v. Pelican, 232 U.S. 442, 445-46 (1914). In the clearest possible terms, the Court stated that restoration to the public domain meant "stripped of reservation status." DeCoteau, 420 U.S. at 446. The United States also has consistently taken the position that such language constituted an explicit expression of a congressional intent to disestablish.[14]

The decisions in Rosebud and DeCoteau fairly reflect the view of the Court on this point. Although in both cases the Court was divided on the question whether the particular area involved had retained reservation status, the Court was unanimous that such restoration language amounted to an unequivocal expression of an intent to disestablish. See Rosebud, 430 U.S. at 589 n.5; id. at 618 (Marshall, J., dissenting); DeCoteau, 420 U.S. at 426-27, 446; id. at 463 (Douglas, J., dissenting). Indeed, Justice Marshall (who wrote the Court's opinion in Solem) observed in his dissenting opinion in Rosebud that an 1889 surplus land act expressly restoring lands to the public domain (25 Stat. 896, § 21) was "yet another example" of "'clear language of express termination. . .'."

[14] See Memorandum for the United States as Amicus Curiae, at 12-14, Rosebud Sioux Tribe v. Kneip, No. 75-562 (April 17, 1976); Brief for the United States as Amicus Curiae, at 8, 15, & 17-18, Rosebud, supra (September, 1976); Brief for the United States as Amicus Curiae, at 10 & 16-17, DeCoteau v. District County Court, Nos. 73-1148 & 73-1500 (November 1974); Brief for the United States as Amicus Curiae, at 24, Mattz v. Arnett, No. 73-1182 (March, 1973). For instance, in Rosebud, the United States emphasized that "the clear language of other Acts expressly restoring lands to the public domain is notably absent. . . ." Brief for the United States, supra, at 8.

Id., 430 U.S. at 618.[15] Accord: Perank (Resp. App. B, pp. 21a-22a; p. 19a, n.11).[16]

Contrary to the en banc decision of the Tenth Circuit, Solem did not reject this firmly-established rule of interpretation. The crucial provision interpreted in Solem did not provide for the restoration of the surplus lands to the public domain, nor was any such language contained in the operative portions of the Solem legislation. Instead, a reference to "public domain" appeared in a subsequent section providing that tribal members could harvest timber on certain portions of the opened lands, "only as long as the land remained part of the public domain." § 9, 35 Stat. 464. The Court acknowledged that even this oblique reference was evidence of disestablishment; it found, however, that because the phrase was "isolated," it could

[15] For "additional examples," Justice Marshall cited (430 U.S. at 618) the National Indian Law Library's compilation of Allotment/Cession Statutes, which states that "[t]hose statutes we have titled 'restored to the public domain' are those which appear to have the clearest language of disestablishment. . . ." Compilation, at 2 (Doc. No. 002279) (emphasis added).

[16] The decision by this Court in United States v. Pelican, 232 U.S. 442 (1914), first dealt specifically with "restored to the public domain" language in legislation opening a portion of the Colville Reservation. Pelican is also important because it was decided at a time contemporaneous with many of the reservation openings. In Pelican, Congress provided that the north half of the Colville Reservation was to be "vacated and restored to the public domain"--to be disposed of under applicable public land laws. Prior to the opening, Indians were given individual allotments. This Court held that the restoration of the lands to the public domain diminished the north half of the reservation, except for any Indian allotments, which remained "Indian Country." Pelican, 232 U.S. at 445-46.

not be dispositive. Solem, 465 U.S. at 475. Accord: Perank (Resp. App. B, pp. 22a-23a).

In justifying its expansive interpretation of Solem, the en banc majority also relied upon a footnote in Solem that stated there was "considerable doubt as to what Congress meant in using. . ."public domain terminology in the Solem legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement" (id., 465 U.S. at 475 n.17). It is evident, however, that the Court did not intend this statement in Solem to overrule its prior decisions and to discount the significance of public domain language in every other instance. The Court had already indicated that such language supported the disestablishment claim and, in any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in the prior cases, regarding the significance of such restoration language.

The Tenth Circuit Court's decision to the contrary also overlooks the Solem Court's later observation, in the context of subsequent jurisdictional history, that:

> "Unentered lands were considered a part of the reservation. They were available for allotment to tribal members, they were leased for the benefit of the tribe, and they were specifically defined as different from land in public domain."

Id. at 480, n.25 (emphasis added), quoting F. Hoxie, Jurisdiction on the Cheyenne River Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 87 (undated). The reference to public domain in the quoted passage can only be understood to mean that public domain and reservation status are mutually exclusive.[17] In short, Solem does not, as the en banc majority in Ute Indian Tribe believed, signal this Court's abandonment of its previous interpretations of restoration to public domain language. Such language continues to be the clearest expression of disestablishment and the Tenth Circuit erred in holding otherwise.

2. Since the Ute Indian Tribe decision, a recent opinion by a panel of the Tenth Circuit seriously questions the analysis of Solem by the en banc majority of the Tenth Circuit Court in Ute Indian Tribe. The case of Pittsburg & Midway Coal Mining Company v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990) (hereinafter Yazzie), decided whether a portion of the Navajo Reservation in New Mexico had been disestablished.

As opposed to Ute Indian Tribe, the Yazzie decision gives the proper emphasis to the "restored to the public domain" language used in the specific act opening

---

[17] This is how the author of the quoted study understood it, as he considered public domain status to be crucial in interpreting the subsequent jurisdictional treatment of the area involved. See Hoxie, at 87-88. Thus, he stated that it was necessary to determine whether the area in question was "administered as part of the public domain. . . ." Id., at 87.

a reservation to entry. The Tenth Circuit panel in Yazzie correctly reads Solem and gives "restored to the public domain" language its proper consideration as an important part of the analytical test for disestablishment of Indian reservations, and a clear indication of congressional intent to disestablish. Yazzie, 909 F.2d at 1397-1405. Indeed, the Yazzie panel was openly critical of the treatment of the "public domain" language in Ute Indian Tribe:

> Our conclusion in Ute that the generic phrase ["restore to the public domain"] was ambiguous is undercut . . . by our conflicting statement earlier in the same opinion that public domain language implies "a wholesale diminishment of the Reservation." Moreover, our conclusion [in Ute Tribe] is unexamined and unsupported in the opinion.

Yazzie, 909 F.2d at 1400 (emphasis added).

3. The Ute Indian Tribe decision is also at odds with the decisions of other courts of appeals in disestablishment cases. The Eighth and Ninth Circuits, in a long line of decisions, have consistently recognized that restoration to public domain language is an explicit expression of congressional intent to disestablish.[18] The significance

[18] See, e.g., Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Feather v. Erickson, 489 F.2d 99, 100 (8th Cir. 1973), rev'd on other grounds sub nom. DeCoteau v. District County Court, 420 U.S. 425 (1975); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687-88 (8th Cir. 1973); Beardslee v. United States, 387 F.2d 280, 285 (8th Cir. 1967)(Blackmun, J.); DeMarrias v. South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Russ

these decisions accorded to restoration to public domain language has a sound historical foundation and follows well-established principles regarding the public lands (see Resp. App. C, pp. 115a-116a (Seth, J., dissenting)). Long before the acts in question here, it was settled law that when the federal government appropriates or reserves a tract for any purpose, such as an Indian reservation, the tract is thereby severed from the public domain. That is, it loses its status as public lands.[19] Contrary to the Tenth

v. Wilkins, 624 F.2d 914, 915, 924 & 927-29 (9th Cir. 1980)(Hoffman, J., dissenting), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 696 (9th Cir. 1976). See also Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 817 n.8 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); United States ex rel Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957).

District court and state court decisions in the disestablishment context have been to the same effect. See, e.g., Russ v. Wilkins, 410 F. Supp. 579, 581-82 (N.D. Cal. 1976), rev'd on other grounds, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel Condon v. Erickson, 344 F. Supp. 777, 778 (D.S.D. 1972), aff'd, 478 F.2d 684 (8th Cir. 1973); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1005 (D. Minn. 1971); Stankey v. Waddell, 256 N.W.2d 117, 119 (S.D. 1977); Wood v. Jameson, 130 N.W.2d 95, 99 (S.D. 1964); Lafferty v. State, 125 N.W.2d 171, 174 (S.D. 1963).

[19] See, e.g., Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839); Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733, 745 (1875); Hastings and Dakota Railroad Co. v. Whitney, 132 U.S. 357, 360-61 (1889); Bardon v. Northern Pacific Railroad Co., 145 U.S. 535, 539 (1892); Spalding v. Chandler, 160 U.S. 394, 404-05 (1896); Gibson v. Anderson, 131 Fed. 39, 41-42 (9th Cir. 1904); United States v. Tichenor, 12 Fed. 415, 421 (D. Ore. 1882); Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fe R.R. Co., 13 Fed. 106, 107 (D. Kan. 1881); United States v. Payne, 8 Fed. 883, 893-94 (W.D. Ark. 1881). "Public domain" and "public lands" traditionally have been

Circuit en banc majority's view, because the reservation of a tract removed it from the public domain,[20] later restoration of the tract to the public domain firmly signified the end of reservation status. Yazzie, 909 F.2d at 1402-04.[21]

In sum, the Tenth Circuit Court's interpretation of Solem in Ute Indian Tribe is inconsistent with the decisions of this Court and the lower federal courts in Indian boundary cases and, in fact, has been questioned by the more recent decision of the Tenth Circuit panel in Yazzie, supra.[22]

B. The Decisions of the Utah Supreme Court in Hagen/Perank Applied the Correct Analytical Test Set Forth in Solem

---

regarded as "equivalent" concepts. Barker v. Harvey, 181 U.S. 481, 490 (1901).

[20] As the Solicitor of the Department of the Interior explained years later in regard to the original Uintah Reservation, "[a]lthough the . . . reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. . . ." Solicitor Opinion M-36051 at 5 (December 7, 1950).

[21] See Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

[22] Ute Indian Tribe also ignored other relevant components of the clear analytical test by ignoring subsequent administrative treatment and the demographic history of the opened area. Solem, 465 U.S. at 471-72.

Contrasted with the Tenth Circuit's en banc decision in Ute Indian Tribe, the Utah Supreme Court faithfully followed the "clean analytical structure" for determining reservation disestablishment set forth in Solem and the preceding decisions of this Court.[23]

The Utah Supreme Court carefully examined all of this Court's recent disestablishment cases, and gave the proper emphasis to the "restored to public domain" language which clearly appeared in the operative section of the 1902 Act (Perank, Resp. App. B, pp. 13a-28a; 1902 Act, Resp. App. D, p. 138a).

The Perank decision further contains a detailed analysis of presidential proclamations regarding the opening of the Uintah Reservation and contemporaneous and subsequent executive branch treatment of the opened area ignored by the Ute Indian Tribe decision--all of which supports a conclusion of disestablishment (see e.g., Resp. App. B, pp. 44a-61a). For example, the Utah Supreme Court examined the Presidential Proclamation of July 14, 1905, which actually set the date for opening the reservation, and specifically referred to the 1902 Act as restoring the surplus lands to the public domain. Perank, Resp. App. B, p. 45a; Proc., Resp. App. D, p. 155a. The Utah Supreme Court viewed the proclamation as an unambiguous and contemporaneous statement by the

---

[23] We also submit that the original panel decision of the Tenth Circuit Court, as well as the decision in Yazzie, supra, applied the correct analysis. Compare Hagen/Perank to Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (10th Cir. Three-Judge Panel, 1983) and Yazzie, 909 F.2d 1387 (10th Cir. 1990).

Nation's Chief Executive and entitled to significant weight. Rosebud, 430 U.S. at 602-03.[24]

Moreover, in its Hagen/Perank decisions, the Utah Supreme Court finally had an opportunity to do what this Court told it to do on remanding Brough in 1977 (431 U.S.901)--to re-examine the Uintah Reservation boundary issue in light of this Court's decisions. The Perank decision contains a detailed discussion of Solem and preceding cases and a complete analysis of the weight to be given "restored to the public domain" language. Other parts of the analytical test were also carefully considered. We further submit that the Utah Supreme Court reached the correct result.

CONCLUSION

For the foregoing reasons, Respondent State of Utah urges that the Petition for a Writ of Certiorari be granted.

---

[24] The Utah Supreme Court also examined the Presidential Proclamation of 1906 (34 Stat. 3228), which adopted the same construction of the operative acts as the 1905 proclamation and, for the first time, referred to the "former Uintah Indian Reservation." Perank, Resp. App. B, p. 47a.

Respectfully submitted,

R. PAUL VAN DAM
Attorney General of Utah
JAN GRAHAM
Utah Solicitor General
DAVID B. THOMPSON
Assistant Attorney General
MICHAEL M. QUEALY
(Counsel of Record)
Assistant Attorney General
Attorneys for Respondent
State of Utah

APPENDIX

APPENDIX A

In the SUPREME COURT of the STATE OF UTAH

----ooOoo----

State of Utah,
Plaintiff and Petitioner,

v.

Robert Hagen,
Defendant and Respondent.

No. 910017

F I L E D
July 17, 1992

Geoffrey J. Butler, Clerk

Eighth District, Duchesne County
The Honorable Dennis L. Draney

Attorneys: R. Paul Van Dam, David B. Thompson, Michael M. Quealy, Salt Lake City, for plaintiff
Joel Berrett, Roosevelt, for defendant

On Certiorari to the Utah Court of Appeals

DURHAM, Justice:

Defendant Robert Hagen pleaded guilty in Eighth District Court to distributing a controlled substance, a third degree felony under Utah Code Ann. § 58-37-8(1)(b)(ii) (Supp. 1991). The plea affidavit stated that

defendant sold marijuana from his residence in Myton, Duchesne County, Utah. Prior to sentencing, defendant moved to arrest judgment and to withdraw his guilty plea. In his motion, he challenged the court's jurisdiction on the basis that he was an Indian and his alleged crime occurred in Indian country, the Uintah-Ouray Reservation, and was thus not subject to state court jurisdiction. Federal law provides for exclusive federal jurisdiction over a defendant who is an American Indian and who commits a criminal offense in Indian country.[1] 18 U.S.C. §§ 1152, 1153 (1988). The court denied the motion. Defendant subsequently appealed the conviction to the Utah Court of Appeals. The court of appeals reversed defendant's conviction, holding that a 1985 Tenth Circuit decision had conclusively determined that Myton was in Indian country and holding that the State had failed to meet its burden of disproving defendant's personal Indian status. We issued a writ of certiorari to review the decision of the court of appeals.

We conclude that the court of appeals erred in treating Myton as Indian country. This court's opinion today in State v. Perank, No. 860254, slip op. (Utah July 17, 1992), establishes that for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country. See id. at 9 n.10; id. at 41. In Perank, we held that 1902 and 1905 congressional acts diminished the original Uintah Indian Reservation boundaries and that subsequent homesteading and settlement therefore occurred on lands restored to the public domain. See id. at 8, 19-29. We concluded that

[1] There are certain exceptions to this general grant of jurisdiction. These exceptions, however, are not relevant to the disposition of this case.

Myton, Utah, where defendant's alleged criminal conduct occurred, is therefore not in Indian country. See id. at 41. Thus, in the instant case defendant's criminal conduct in Myton may form the basis of state court jurisdiction, regardless of defendant's personal Indian status. We therefore reverse the decision of the court of appeals and reinstate defendant's conviction.

Reversed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Zimmerman, Justice, dissents.

APPENDIX B

In the SUPREME COURT of the STATE OF UTAH

----ooOoo----

State of Utah,
Plaintiff and Appellee,

v.

Clinton Perank,
Defendant and Appellant.

No. 860243
F I L E D
July 17, 1992

Geoffrey J. Butler, Clerk

Seventh District, Duchesne County
The Honorable Richard C. Davidson

Attorneys: David L. Wilkinson, Earl F. Dorius, Michael M. Quealy, Dallin W. Jensen, Salt Lake City, for State of Utah
Kirk C. Bennett, West Valley, for Perank
Alvin G. Nash, Vernal, Herbert W. Gillespie, Duchesne, Tom D. Tobin, Alvin Pahlke, Susan W. Pahlke, Winner, South Dakota, for Amici Duchesne County and Uintah County
Stephen G. Boyden, Salt Lake, for Amicus Ute Indian Tribe

STEWART, Justice:

Clinton Perank was convicted in a state court of committing a burglary in Myton, Utah, in violation of Utah Code Ann. § 76-6-202 (1978), and placed on probation. The court thereafter revoked his probation and ordered him committed to the Utah State Prison for a term of 0-5 years. Perank appealed from the revocation of probation, and we stayed execution of the sentence pending appeal.[1]

Perank argues that the state trial court lacked jurisdiction to convict him of burglary and that the Ute Tribal Court had exclusive jurisdiction because he is an Indian and the offense occurred within Indian country. Two issues are presented: (1) whether Perank is an Indian and (2) whether the Uintah-Ouray Indian Reservation was diminished by an act of Congress, leaving Myton, Utah, outside the jurisdictional boundaries of that Reservation.

Even though Perank pleaded guilty to the burglary charge and did not raise the issue of lack of subject matter jurisdiction with respect to the burglary until the probation revocation proceeding, the issue is properly before this Court. A plea of guilty does not waive a claim that the court lacks power to adjudicate a charge against the defendant. Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); see also 1 Charles A. Wright, Federal Practice and Procedure § 175, at 623-33 (1982). Also, the issue of subject matter jurisdiction can be raised at any time. See

[1] Appellate jurisdiction of this case would ordinarily lie with the Utah Court of Appeals. See Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1988). Because of the importance of the question presented, the Court of Appeals certified the case to this Court.

Glasmann v. Second District Court, 80 Utah 1, 7, 12 P.2d 361, 363 (1932).

This Court invited the United States Department of Justice to file an amicus curiae brief in this case because of the importance of the issue of the location of the boundaries of the Uintah-Ouray Indian Reservation (sometimes hereinafter "Uintah Reservation") and because the Department had filed an amicus brief in opposition to the State of Utah's petition for certiorari to the United States Supreme Court from a decision of the United States Court of Appeals for the Tenth Circuit which held that the Uintah Reservation had not been diminished under a series of congressional acts from 1902 to 1905. See Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). The Department of Justice submitted to this Court a copy of the amicus brief it filed for the United States opposing the State's petition for certiorari in Ute Indian Tribe. In that brief, the Department stated, inter alia, that the issues presented in the petition for a writ of certiorari did not require review by the Supreme Court at that time because they could be addressed in a later case if the Utah Supreme Court were to disagree with the Tenth Circuit.[2]

[2] The Department of Justice in its amicus brief failed to recognize that the Tenth Circuit's en banc decision in Ute Indian Tribe was in conflict with prior decisions of this Court. See Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910); White Rocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914). The Department referred only to Brough v. Appawara, 553 P.2d 934 (Utah 1976), which was vacated and remanded for further consideration. Brough v. Appawara, 431 U.S. 901 (1977). No further opinion was rendered by this Court in Brough. The Department's brief stated, "If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the

The Ute Indian Tribe, also at our invitation, filed an amicus brief, but addressed only the issue of whether Perank is an Indian within the meaning of 18 U.S.C. § 1152. We note that neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's en banc decision in Ute Indian Tribe has res judicata effect in this case.[3]

---

intervening decision in Solem and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review." Brief for the United States in opposition as Amicus Curiae, Utah v. Ute Indian Tribe, on petition for writ of certiorari to United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 14-15.

[3] Res judicata is an affirmative defense in both criminal and civil cases and therefore is waivable. See Utah R. Civ. P. 8(c), 12(h); Rothey v. Walker Bank & Trust Co., 754 P.2d 1222, 1225 (Utah 1988); Manger v. Davis, 619 P.2d 687, 692 (Utah 1980); Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972); Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Louisville v. Nashville R.R. v. M/V Bayou Lacombe, 579 F.2d 496, 471 n.1 (5th Cir. 1979); Parks v. Pavkovic, 753 F.2d 1397, 1404 (7th Cir. 1985); State v. Hall, 383 P.2d 602, 611-12 (Idaho 1963). Even if the defense had been been raised in this case, its application against the State of Utah would be problematic. Although we have held that collateral estoppel does not require mutuality of parties when used defensively against private litigants, see Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983); Searle Brothers v. Searle, 588 P.2d 689, 690-91 (Utah 1978), we have not decided whether the doctrine of nonmutual collateral estoppel applies against the State. Federal law generally requires full mutuality of parties when collateral estoppel is applied against the government. See United States v. Mendoza, 464 U.S. 154 (1984); see also United States v. Stauffer Chemical Co., 464 U.S. 165, 169 (1984); Allen v. McCurry, 449 U.S. 90 (1980); Montana v. United States, 440 U.S. 147, 155-62 (1979); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948). Nonmutual collateral estoppel does not apply against the government because of overriding policy

I. PERANK'S INDIAN STATUS

State criminal jurisdiction does not extend to Indians who commit crimes in Indian country. See 18 U.S.C. §§ 1152, 1153 (1982 & Supp. 1991).[4] Federal statutes, however, do not define the term "Indian" for jurisdictional purposes. Although the State concedes that Perank is an Indian, the Tribe, as amicus, argues that he is not. Ordinarily, an amicus may only present arguments pertaining to issues properly raised by the parties before the court. However, because this issue goes to subject matter jurisdiction, we will address it.

---

considerations. Mendoza, 464 U.S. at 163-64. The rule requiring full mutuality of parties has also been required with respect to estopping state governments. See Hercules Carriers, Inc. v. Florida, 768 F.2d 1558, 1577-82 (11th Cir. 1985). See generally Restatement (Second) of Judgments § 28 (1982); 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4425 (1981 & Supp. 1992). As the Utah cases cited in footnote 2 indicate, the issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

[4] A complex set of rules governs criminal jurisdiction in Indian country. See generally Felix S. Cohen, Handbook of Federal Indian Law 34-38, 286-304, 335-41 (1982); Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976); Scott W. Wilson, Criminal Jurisdiction in Montana Indian Country, 47 Mont. L. Rev. 513 (1986); Paul S. Volk, Note, The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians, 20 New Eng. L. Rev. 247 (1984-85); K. Bliss Adams, Note, Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes, 24 Tulsa L.J. 89 (1988).

The Tribe argues that Perank is not an Indian under the jurisdictional statute because he was not officially enrolled as a member of the Tribe at the time of the burglary. We disagree and hold that Perank was an Indian at the time of the crime for purposes of 18 U.S.C. §§ 1152, 1153.[5]

---

[5] Section 1152 of the United States Code provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section 1153 of the Code provides:

> Any Indian who commits against the person or property of another Indian or another person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846), set forth two factors to be evaluated in determining who is an Indian. A person is an Indian who (1) has a significant degree of Indian blood and (2) is recognized as an Indian by a tribe or society of Indians or by the federal government. See United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988); State v. LaPier, 790 P.2d 983, 986 (Mont. 1990); State v. Attebery, 519 P.2d 53, 54 (Ariz. 1974); see also Ex parte Pero, 99 F.2d 28, 30-32 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939); Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 515-16 (1976).[6]

> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

[6] While federal criminal statutes do not define the term "Indian," 25 U.S.C. § 479 (1983) defines Indian for the purposes of land ownership and allotment:

> The term "Indian" as used in [various sections of Subchapter V--Protection of Indians and Conservation of Resources] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

We turn to the first factor, whether Perank has a significant degree of Indian blood. As the son of a full-blood Ute father and a mixed-blood mother, Perank has more than one-half Indian blood and at least one-half Ute blood, which is sufficient to satisfy the first requirement under Rogers. Persons with less than one-half Indian blood have been held to have a significant degree of Indian blood. See, e.g., St. Cloud, 702 F. Supp. at 1460-61 (holding 15/32 Yankton Sioux blood sufficient to establish the first Rogers requirement and citing four cases which held less than 1/2 Indian blood to be sufficient); Makah Indian Tribe v. Clallam County, 440 P. 2d 442, 444 (Wash. 1968) (1/4 Indian blood sufficient).

Perank has also been recognized as an Indian by both the Tribe and the federal government. Although Perank was not formally enrolled in the Ute Tribe at the time of his conviction, lack of enrollment does not determine Indian status for purposes of jurisdiction. See Ex parte Pero, 99 F.2d at 31; St. Cloud, 702 F. Supp. at 1461; LaPier, 790 P.2d at 987. Nevertheless, the Tribe formally recognized Perank as an Indian and as a member of the Tribe by his enrollment in the Tribe at a later date. Moreover, under the terms of the Ute Indian Tribe Constitution, it appears that Perank was a member of the Ute Tribe at the time of the offense. Article II, section 1(b) of the Constitution provided that a child born to a member of the Tribe living on the Reservation at the time

---

Perank would be considered an Indian under this provision because he has one-half or more Indian blood. The definition of the term "Indian" may vary, however, depending on the context for which Indian identity is relevant. See Felix S. Cohen, Handbook of Federal Indian Law 19-20 (1982).

of the birth is entitled to membership. That provision states:

> Section 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows:
>
> . . . .
>
> (b) All children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children.

Ute Indian Tribe of the Uintah and Ouray Reservation Const. art. II, § 1.[7] Perank's father was an enrolled member of the Tribe and resided on the Reservation when Perank was born.[8] In Chapoose v. Uintah And Ouray Tribal Business Committee, Civ. No. 133-77, slip op. at 16-19 (Ute Tribal App. Ct. Jan. 22, 1981), the Ute Tribal Appellate Court held that Tribe membership was an automatic right for those who qualified under article II, section 1 of the Ute Constitution. Enrollment merely formalized the right.

In addition, according to an affidavit filed by Perank in the trial court, he has lived as an Indian by maintaining social, political, and spiritual relations as an Indian,

---

[7] We take judicial notice of the Tribal Constitution pursuant to Rule 20(b) of the Utah Rules of Evidence. This provision of the Constitution was amended in 1988.

[8] These facts are taken from affidavits of Perank's parents submitted in the revocation proceeding.

including participation in Indian rituals. In his brief, he states that he "has lived his life as an Indian, and has been treated as an Indian by governmental entities." Also, in January 1986, Perank was convicted of three offenses in the Ute Tribal Court.

On these facts, we conclude that Perank carried his burden of factually establishing that he has been "recognized racially" as a Ute Indian. Accordingly, we hold that Perank is an Indian for the purpose of determining jurisdiction under 18 U.S.C. §§ 1152 and 1153.

II. THE BOUNDARIES OF THE UINTAH-OURAY RESERVATION

The next issue is whether Myton, Utah, the site of the burglary, lies within Indian country, i.e.,within the boundaries of the Uintah-Ouray Reservation. If so, the district court lacked jurisdiction over the crime under 18 U.S.C. § 1152.[9] There are two contentions: first, that Myton is not within the Uintah-Ouray Reservation because the Reservation was diminished by a 1902 congressional Act as amended and supplemented by subsequent Indian Appropriation Acts in 1903, 1904, and 1905, and second, that the 1905 Act opened the Reservation without regard to the 1902 Act and that the language of the 1905 Act left the boundaries of the Reservation intact.

---

[9] 18 U.S.C. § 1152 precludes the exercise of state jurisdiction over crimes committed by Indians in Indian country, and section 1151 defines Indian country to include all land within a reservation. See supra note 5.

Resolution of the diminishment issue turns on two issues. The first is whether the language of the Act of May 27, 1902, which provided that the unallotted lands were to be "restored to public domain," if used as operative statutory language opening a reservation would effect a diminishment of that reservation as to the lands so restored. The second issue is whether, as a matter of statutory construction, the operative language in the 1902 Act, "restored to the public domain," remained in effect as operative statutory language when the Reservation was finally opened in 1905.

We hold that the restoration language in the 1902 Act established the necessary congressional intent to diminish the Reservation as to those lands restored to the public domain and that the restoration language in the 1902 Act remained operative statutory language when the Reservation was opened in 1905.

For clarity, we observe that all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use. These lands are collectively referred to as "trust lands." Furthermore, it is an undisputed fact that approximately 1,010,000Reservation acres were withdrawn and attached to what are now the Ashley and Uintah National Forests by presidential proclamation, pursuant to the 1905 Act. The legal status of these lands is not at issue here, nor is the legal status of the Uncompahgre Reservation, a neighboring reservation in eastern Utah. In 1948, Congress added to the Reservation 510,000 acres known as the Hill Creek Extension. Act of March 11, 1948, 62 Stat. 72. The status of that land is likewise not at issue. We note that the en banc decision

in Ute Indian Tribe held that the land added to the Uintah National Forest remained in the Reservation and that the Uncompahgre Reservation was not disestablished. 773 F.2d 1089-90; id. at 1099-1101 (Seymour, J., concurring). The only issue in this case, therefore, is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 "Order of Restoration" are within the present boundaries of the Reservation.[10]

---

[10] In 1902, the Uintah Reservation contained approximately 2,039,040acres. The federal government in 1905 withdrew 1,010,000 acres as an addition to the Uintah National Forest. The allotments to individual Indians under the 1902 Act and the lands reserved for grazing and other purposes set aside for the Tribe by a 1902 Joint Resolution and the 1903 and 1905 Acts make up approximately 360,000 acres. An executive "Order of Restoration" under the authority of the Act of June 18, 1934, 48 Stat. 984, restored to the Tribe in 1945 both the title and tribal jurisdiction to over 217,000 acres that had been previously opened and restored to the public domain in 1905. This Order is discussed later in the text. In 1948, Congress added to the Uintah Reservation the Hill Creek Extension, which contained approximately 510,000acres of the former Uncompahgre Reservation. At present, the Uintah Reservation, including the trust lands, the lands restored to tribal jurisdiction by the Order of Restoration, and the lands added to the Reservation by the Hill Creek Extension, total approximately 1,087,000acres. If the 1,010,000acres of Reservation land that were set apart as an addition to the Uintah Forest Reserve but held to be part of the Reservation in Ute Indian Tribe are added to the 1,087,000acres, the Reservation today is larger than it was in 1902, before the restoration of the unallotted lands to the public domain.

There are approximately 1,500enrolled members of the Ute Tribe. Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting). The tribal seat of government is located at Fort Duchesne, Utah, which is located on trust lands. Most of the lands opened for settlement under the 1905 Act were in Duchesne County. Some 18,000non-Indians now live in the area that the State asserts was disestablished, and only about 300

A. Congressional Intent to Diminish

In 1887, Congress initiated a significant change in policy toward the Indians. The new policy was designed to integrate the Indians into white, agrarian society and ultimately to do away with the reservation system. The General Allotment Act of 1887, ch. 119, 24 Stat. 388, authorized the President to allot parcels of reservation lands to Indians and, with tribal consent, to sell the unallotted, or surplus, reservation lands to non-Indians. Thereafter, Congress from time to time enacted special legislation to ensure that a particular reservation was in fact opened to allotment. Mattz v. Arnett, 412 U.S. 481, 497 (1973).

Questions subsequently arose regarding whether Congress in opening an Indian reservation, or a portion of it, to entry and settlement by non-Indians intended to leave the reservation boundaries intact so that the land opened to settlement remained within the boundaries of the reservation or whether the opening was also intended to diminish the reservation boundaries, thereby placing the opened land outside the reservation In Solem v. Bartlett, 465 U.S. 463, 468 (1984), the Court explained why Congress in enacting the surplus land acts around the turn of the century often did not make its intent with respect to diminishment explicit:

Indians, not all of whom are members of the Ute Tribe, live in that same area. The two towns where the bulk of the non-Indian population reside, Roosevelt and Duchesne, are in the disputed area that the State contends is not subject to tribal jurisdiction. Myton is also in that area.

Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians. Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.). . .).

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time--within a generation at most--the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

As a consequence, each surplus land act must be examined to determine whether Congress intended to reduce the reservation's boundaries because each act employed its own statutory language, "the product of a unique set of tribal negotiation and legislative compromise." Solem, 465 U.S. at 467. Accordingly, the effect of a given surplus land act depends on the language of the act and the circumstances underlying its passage. Id. at 469.

The most probative evidence of whether Congress intended to diminish a reservation is the language used in the statutory scheme opening the reservation. Solem, 465 U.S. at 470. In addition to the intent derived from the face of the act, the surrounding circumstances and the legislative history are to be examined in determining congressional intent. Rosebud Sioux Tribe v. Kneip, 430 U.S.,584, 587 (1977) (citing Mattz v. Arnett, 412 U.S. 481, 505 (1973)). Subsequent treatment of the opened lands by Congress, federal agencies, and local authorities, Solem, 465 U.S. at 471, and subsequent jurisdictional history of the opened lands, Rosebud, 430 U.S. at 603-05; DeCoteau v. District County Court, 420 U.S. 425, 442-44 (1975), may also be useful in resolving the issue of congressional intent to diminish. Congress, however, must have clearly evinced an intent to change the boundaries before diminishment will be found. Solem, 465 U.S. at 470. And although doubtful language should be construed in favor of the Indians and against diminishment, this rule of construction does not dictate a determination that reservation boundaries were not diminished when there is a clear intent to the contrary. See Rosebud, 430 U.S. at 587.

A variety of operative statutory phrases have been held to effect diminishment. See Rosebud, 430 U.S. at 683-84 (Marshall, J., dissenting);[11] Russ v. Wilkins, 624 F.2d 914, 921-22 (9th Cir. 1980); United States v. Parkinson, 525 F.2d 120, 122-24 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). No specific talismanic statutory language is required to conclude that Congress intended to diminish a reservation. See Solem, 470 U.S. at 471, and it is not necessary that statutory language expressly sever tribal jurisdiction to effectuate a diminishment. See Rosebud, 430 U.S. at 586-605; see also Solem, 465 U.S. at 469 n.10. Also, a congressional scheme to diminish need not provide for unconditional compensation or a fixed sum to be paid to the Indians for land to be detached from the reservation. Solem, 465 U.S. at 471; Rosebud, 430 U.S. at 596 n.18. Nor must a scheme to diminish provide for Indian consent. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Solem, 465 U.S. at 470 n.11; Rosebud, 430 U.S. at 587.

Statutory language that merely provides for allotments to be made to the Indians and "opens" the remaining reservation lands to settlement by non-Indians does not demonstrate a congressional intent to diminish the

---

[11] In his dissent in Rosebud, Justice Marshall cited four specific examples of clear language of express termination: (1) "'the Smith River reservation is hereby discontinued'"; (2) "'a portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain'"; (3) "'the reservation lines at the said Ponca and Otoe and Missouria Indian Reservation . . . are hereby abolished'"; and (4) part of the Great Sioux Reservation was "'restored to the public domain.'" Rosebud, 430 U.S. at 618 (Marshall, J., dissenting). In addition, Justice Marshall noted that an Indian library compilation contained eleven additional examples of express termination language taken from statutes enacted between 1888-1913. Id. at 618 n.3.

boundaries of a reservation. Rosebud, 430 U.S. at 586-87; Mattz v. Arnett, 412 U.S. 481, 497 (1973); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 355-58 (1962).

Cession-type language has, however, been held in several cases to establish the requisite intent to diminish. In DeCoteau v. District County Court, 420 U.S. 425 (1975), the statute at issue ratified an agreement between the United States and the Sisseton and Wahpeton bands of Sioux Indians whereby the Indians agreed to "'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in'" the unallotted lands of the Reservation. The Court held that this language was precisely suited to termination of the Reservation boundaries. Id. at 445. Similarly, in Rosebud, the Court held that cession-type language in 1904 Act pertaining to a part of the Sioux Reservation manifested a congressional intent to disestablish, even though the cession language was technically misused in that it implied a bilateral agreement and Congress had acted unilaterally in diminishing the Reservation. Rosebud, 430 U.S. at 587-88.

Statutory language that opens reservation lands to public entry and "restores" those lands to the "public domain" has also been recognized in a number of Supreme Court cases to effectuate a diminishment of reservation boundaries as to such lands. In Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 354 (1962), the Court stated that an 1892 Act that "vacated and restored to the public domain" the north half of the Colville Indian Reservation diminished the bound-

aries as to that part of the Reservation.[12] By contrast, the 1906 Act directly at issue in Seymour merely opened the south half of the Reservation to public entry. Because the 1906 Act contained no language restoring the land to the public domain, there was no diminishment as to the south half. Thus, the premise of the opinion in Seymour was that restoration of reservation land to the public domain constitutes a diminishment.

In Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942), the issue was whether the United States had to pay the Indians compensation for lands that had been added to the Sioux Reservation for Indian use by executive order and later detached from the Reservation and "restored to the public domain," by executive order. An implicit assumption of the opinion is that the land restored to the public domain was no longer subject to tribal jurisdiction and had been detached from the Reservation.

In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Court recognized in dicta that the Act of March 2, 1889, 25 Stat. 896, which "restored to the public domain" a portion of the lands of the Great Sioux Reservation, terminated the Reservation as to those lands. 430 U.S. at 589 & n.5. Even Justice Marshall, who argued in a dissent that the Act at issue in Rosebud lacked an express indication of congressional intent to diminish, recognized that the language of the Act of March 2, 1889, disestablished the Reservation. He stated, "The very Act that created the Rosebud Reservation provides yet another example [of language effecting a diminishment], for in that Act Congress expressly 'restored to the public domain' part of

[12] Act of July 1, 1892, ch. 140, 27 Stat. 62, 63.

the Great Sioux Reservation. Act of Mar. 2, 1889, § 21, 25 Stat. 896." Id. at 618 (Marshall, J., dissenting).

In DeCoteau v. District County Court, 420 U.S. 425 (1975), the Court held that the Lake Traverse Reservation in South Dakota was diminished on the basis of cession-type language, but stated the issue to be whether the Reservation "was terminated and returned to the public domain by the Act of March 3, 1891, c.543, 26 Stat. 1035." In other words, land that was "returned to the public domain" was considered no longer subject to tribal jurisdiction. Indeed, the Court referred to the 1892 Act in Seymour, which, as noted above, disestablished the north half of the Colville Reservation by vacating and restoring it "to the public domain," and compared it with the 1906 Act in Seymour that merely "opened" the south half of the Reservation, but did not disestablish it, and concluded that the 1891 Act at issue was analogous to the 1892 Act in Seymour. 420 U.S. at 448-49.

The Supreme Court's latest discussion of "public domain" language is found in Solem v. Bartlett, 465 U.S. 463 (1984). The Court acknowledged that in the act at issue a reference to the opened areas as being in "the public domain" gave support to the argument for diminishment. The public domain language in Solem was located in an isolated section of the Act, was used only in a descriptive manner, and did not purport to restore any land to the public domain.[13] Because that phrase was

[13] The Act in question, the Cheyenne River Act, contained nine sections and spanned three and one-half pages in the statutes at large. Act of May 29, 1908, ch. 218, 35 Stat. 460-64. The operative language of the Act was found in the first sentence of the first section. 35 Stat.

not an operative provision of the Act, the Court concluded that it did not indicate congressional intent to diminish. Solem, 465 U.S. 474-75.

We have encountered only one case that stands contrary to these Supreme Court decisions on the effect of restoration language. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), held that neither the Uintah-Ouray Reservation nor the adjacent Uncompahgre Reservation had been disestablished or diminished. The majority addressed the effect of restoration language, however, only with respect to the Uncompahgre Reservation. The court, relying on a construction of Solem later rejected by a panel of the Tenth Circuit, concluded that "the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb the ownership of the land by the tribal group." 773 F.2d at 1092. In reaching this conclusion, the lead opinion wholly ignored the teachings of Seymour, Sioux Tribe, Rosebud, DeCoteau, and the authorities cited in Justice Marshall's dissent in Rosebud. With respect to the Uintah Reserva-

460; Solem, 464 U.S. at 472-73. The reference to "public domain" was found in the second proviso of the ninth section, or the last sentence of the Act. It was couched in the context of the Indians' right to use timber on particular sections of the lands to be opened:

> Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

35 Stat. 464. Unlike the instant case, this reference to public domain was clearly not the operative language of the Act.

tion, Ute Indian Tribe held that the terms of the 1905 Act alone governed the status of that Reservation and that the 1905 Act, which had no restoration language, did not diminish the Reservation. 773 F.2d at 1089; id. at 1093 (Seymour, J., concurring). The court stated that the 1902 and intervening Acts did not reveal a "'baseline purpose of disestablishment' that carried through into the 1905 Act." 773 F.2d at 1089.

After the decision in Ute Indian Tribe was rendered, a panel of the Tenth Circuit in Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1397-1404 (10th Cir.), cert. denied, 111 S. Ct. 581 (1990), revisited the issue of the legal meaning of the phrase "restore to the public domain" and held that when used as operative statutory language, the phrase extinguishes reservation boundaries as to that land restored to the public domain. We set out an extended portion of the court's analysis of the legal effect of restoration language, an analysis not undertaken in Ute Indian Tribe:

> [R]ecent Supreme Court cases assume in dicta that congressional restoration language extinguished boundaries. Mattz v. Arnett, 412 U.S. 481, 490, 93 S.Ct. 2245, 2250, 37 L.Ed.2d 92 (1973), cites language from the Indian Appropriations Act of July 27, 1868, ch. CCXLVIII, 15 Stat. 198, 223, (Congress restored Mendocino Reservation lands "to the public lands") as clear and sufficient language of extinguishment of reservation boundaries. Similarly, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 589, n.5, 600, 97 S.Ct. 1361, 1364 n.5, 1370, 51 L.Ed.2d 660 (1977), accepted restoration language in the Act of

March 2, 1889, ch. 405, § 21, 25 Stat. 888, 896 (portion of the Great Sioux Reservation "restored to the public domain") as language demonstrating congressional intent to extinguish prior boundaries. Even Justice Marshall's dissent in Rosebud acknowledges that section twenty-one of the Act of March 2, 1889 expressly disestablished part of the Great Sioux Reservation by restoring it to the public domain. Rosebud Sioux Tribe, 430 U.S. at 618, 97 S.Ct. at 1379 (Marshall, J., dissenting). Furthermore in Decoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), Justice White's majority opinion (holding that cession of Lake Traverse Indian Reservation lands disestablished the reservation boundaries) assumed that restoration language was the equivalent of extinguishment of reservation status for the lands affected. The Court stated: "That the lands ceded . . . were returned to the public domain, stripped of reservation status, can hardly be questioned . . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" DeCoteau, 420 U.S. at 446, 95 S.Ct at 1094 (emphasis added).

Other Supreme Court cases suggest that affected Indian Tribes understood EO [executive order] restoration language to be language cancelling former EOs. In Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), the Sioux sought compensation for the value of lands "restored to the public domain" but did not contest in that action, or any

other of which we are aware, the fact that whatever Tribal interest had been created by additions to the Great Sioux Reservation under EOs of 1875 and 1876 had been terminated by the restoration language of the subsequent EOs of 1879 and 1884. (The Court itself viewed such language as the equivalent of "cancelling or revoking" an EO establishing a Reservation or adding thereto. Sioux, 316 U.S. at 330, 62 S.Ct. at 1101.) See also Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 176, 67 S.Ct. 650, 653, 91 L.Ed. 823 (1947).

Evidence that lower courts have accepted the view that restoration language is synonymous with extinction of reservation status is found in Russ v. Wilkins, 410 F.Supp. 579 (N.D. Cal. 1976). "On many occasions Congress has unilaterally terminated sections of reservations by restoring them to the public domain. . . . The Act of 1873 [pertaining to the Round Valley Reservation in California] specifically 'restored to the public lands' the 12,000 acres it severed from the Reservation." Id. at 581. The court found that a subsequent 1905 act failing to employ restoration language did not terminate the reservation in question.

In summary, federal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as lan-

> guage of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

Yazzie, 909 F.2d at 1402-04 (footnotes omitted). In Yazzie, the court criticized the conclusion in Ute Indian Tribe that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish, and characterized it as "unexamined and unsupported." Id. at 1400. Yazzie clearly departs from the court's prior conclusion in Ute Indian Tribe as to the effect of restoration language. Indeed, Yazzie held that the use of operative restoration language diminishes a reservation as to the land restored to the public domain.

Yazzie is consistent with a long line of lower federal court and state court decisions. See, e.g., Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687-88 (8th Cir. 1973); DeMarrias v. South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Russ v. Wilkins, 624 F.2d 914-15, 924, 927-29 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transp. Co., 543 F.2d 676, 696 (9th Cir. 1976); see also United States ex rel. Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957); Russ v. Wilkins, 410 F. Supp. 579, 581 (N.D. Cal. 1976), rev'd on other grounds, 624 F.2d 914 (9th Cir. 1980); United States ex rel. Condon v. Erickson, 344 F. Supp. 777, 778 (D.S.D. 1972), aff'd, 478 F.2d 684 (8th Cir. 1973); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp.

1001, 1005 (D. Minn. 1971); Lafferty v. State, 125 N.W.2d 171, 174 (S.D. 1963).

On the basis of the above, we conclude that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent to diminish the reservation as to the land so restored.

B. Whether the Unallotted Lands Were Restored to the Public Domain Pursuant to the 1902 and 1905 Acts of Congress

Provisions in four statutes, the Indian Appropriation Acts of 1902, 1903, 1904, and 1905, dealt with the opening of the Uintah-Ouray Reservation. The next issue is whether, as a matter of statutory construction, the provision in the 1902 Act which stated that unallotted reservation lands would be "restored to the public domain" remained in effect when the Reservation was finally opened by a presidential proclamation in 1905. That issue turns on the language of the Acts in question.

For the reasons that follow, we hold that as a matter of statutory construction, the 1905 Act was merely amendatory and supplementary to the 1902 Act and therefore did not accomplish the opening of the Reservation independent of the 1902 Act. By way of a brief overview, we note that the pertinent statutes, legislative history, and contemporaneous and subsequent congressional, executive, and judicial constructions of the 1902 and 1905 Acts all show that the 1902 Act was considered the basic statute dealing with the opening of the Reservation and that the

subsequent Acts did not repeal the 1902 Act's restoration language.

1. Establishment of the Uintah Reservation

The Indians who settled on the Uintah-Ouray Reservation consisted of several bands originally living in an area that included parts of what are now Colorado, Utah, and New Mexico. The Uintah Valley in eastern Utah was "set apart and reserved for the use and occupancy of Indian tribes" pursuant to an executive order issued by President Lincoln in 1861. I Kappler 900. In 1864, Congress authorized the Superintendent of Indian Affairs to bring together and settle in the Uintah Valley as many of the Indians living in the Utah Territory as practicable. Act of May 5, 1864, ch. 77, 13 Stat. 63. The Act set apart the Uintah Valley "for permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." Thus, the Reservation was neither created by treaty nor established for a specific tribe. Indeed, several different bands of Indians settled on the Reservation.

In 1888, the year after the enactment of the General Allotment Act, Congress, with the consent of the Indians, diminished the Uintah-Ouray Reservation by providing that approximately 7,000 acres, known as the Gilsonite Strip, were "to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. This Act concededly had the effect of diminishing the Reservation's boundaries. The United States District Court for the District of Utah so held in Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1099 (D. Utah 1981), and the Tribe did not appeal that ruling.

Congress first sought to open the Uintah Reservation to non-Indian settlement by the Indian Appropriations Act of 1894. Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38. The 1894 Act directed a commission to negotiate with the Indians for the "relinquishment to the United States" of lands not needed for allotments.[14] No agreement, however, was forthcoming. In 1898, Congress provided for the "cession" of unallotted Indian lands on the Uintah-Ouray Reservation to the United States, subject to the consent of the Indians. Act of June 4, 1898, ch. 376, 30 Stat. 429. Again, because of Indian resistance, the purpose of this Act was not accomplished.

2. The Indian Appropriations Acts of 1902, 1903, 1904, and 1905

The Indian Appropriations Act of 1902 provided a comprehensive and detailed scheme for opening the Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 245. In summary, the Act provided that (1) Indian consent was to be obtained; (2) allotments were to be made to the members of the Uintah and White River Tribes of Ute Indians, with 80 acres of irrigable, agricultural Reservation

---

[14] The 1894 Act also began the opening process on the neighboring Uncompahgre Reservation. The Act provided for a commission to determine which lands on the Uncompahgre Reservation were unsuited or not required for allotments so that such lands could be "restored to the public domain and made subject to entry . . . ." Pursuant to the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, Congress mandated the allotment and opening of the Uncompahgre Reservation. See Ute Indian Tribe, 521 F. Supp. at 1105-10. We do not address the issue of whether the Uncompahgre Reservation has been disestablished. The Tenth Circuit held that it was not. Ute Indian Tribe, 772 F.2d at 1090-93; id. at 1093-99 (Seymour, J., concurring).

land allotted to each "head of the family" and 40 acres of such land allotted to each "other member of said tribes;" (3) the allotments were to be made prior to October 1, 1903; (4) all unallotted lands were to be "restored to the public domain" on October 1, 1903; (5) land opened for public entry under the homestead laws would be sold for $1.25 per acre; (6) the proceeds from the "sale of the lands so restored to the public domain" would be used first to reimburse the United States for money advanced to the Indians to effectuate the provisions of the Act and then for the benefit of the Uintah and White River Ute Indians; and (7) persons or companies having then-existing mineral leases approved by the Secretary of the Interior or permits to negotiate with the Indians for mineral leases on the Reservation were to have a preferential right, in lieu of such a lease or permit, to locate 640 acres of contiguous mining land under the mining laws up to "thirty days before said lands are restored to the public domain." It is important to note that the date fixed by the 1902 Act for restoring the unallotted lands to the public domain was also the date for opening the unallotted lands to public entry and for completing the allotments of land to the Indians. Thus, the same date was critical to all three interrelated events.

The 1902 Act provided:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall be caused to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty

> acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: Provided, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: And provided further, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

(Emphasis added.)

Less than a month after enactment of the 1902 Act, a Joint Resolution was passed on June 19, 1902, providing for the establishment of a tribal grazing reserve and for certain allotments of Uintah Reservation lands to be made to Uncompahgre Indians.[15] J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902). The 1902 Joint Resolution affirmed the proposition that after the allotments were made to the Indians and the grazing reserve was established, the surplus lands were to be restored "to the public domain."[16]

---

[15] Although the 1902 Joint Resolution provided for allotments on the Uintah Reservation to Uncompahgre Utes, the Uncompahgre Utes did not share in the proceeds from the opened lands.

[16] The 1902 Joint Resolution provided in part:

> In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.
>
> All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart, as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians

Prior to October 1, 1903, it became apparent that the surveying necessary to make the allotments to the Indians could not be completed and Indian consent would not be forthcoming. Accordingly, Congress enacted the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98. That Act specifically amended the 1902 Act in three respects: (1) It dispensed with the requirement that the Indians give their consent to the opening of the Reservation and the allotment program, although their consent was to be initially solicited; (2) it changed the October 1, 1903 date for "opening the unallotted lands to public entry on said Uintah Reservation as provided by the Act of May twenty-seventh nineteen hundred and two" to October 1, 1904; and (3) it provided that the grazing reserve established by the 1902 Joint Resolution should be limited to 250,000 acres and should be located on lands south of the Strawberry River.[17] The provision in the 1903 Act that the

---

> receiving allotments in said reservation of the reduced area here named.
>
> . . . .
>
> The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

(Emphasis added.)

[17] The 1903 Act stated in pertinent part:

> To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purpose

allotments to the Indians and the opening of the Reservation would proceed even without Indian consent was apparently based on the United States Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903),

---

of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: Provided, however, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: And provided further, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: And provided further, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

decided January 5, 1903, which held that Congress could unilaterally diminish a reservation.[18]

The 1903 Act also appropriated additional funds to pay for the surveying necessary to make the allotments to the Indians under the terms of the 1902 Act. Although the 1903 Act did not itself contain restoration language, it was clearly understood that the restoration language of the 1902 Act remained in effect.

Pursuant to the statutory direction, Indian consent was solicited. The Bureau of Indian Affairs instructed Inspector James McLaughlin to meet with the Indians and explain the provisions of the 1902 and 1903 Acts and, if possible, obtain their consent to the congressional program for the allotment of lands to the Indians and the restoration of the surplus lands to the public domain. See Letter from Acting Commissioner of Indian Affairs to James McLaughlin, United States Indian Inspector, at 5 (April 29, 1903). Inspector McLaughlin met with the Indians in May 1903 and explained that the allotments would be made with or without their consent and that the Reservation would be diminished. Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, from May 18 to 23, 1903, at 34-35. He explicitly explained the congressional intent to diminish the Reservation:

---

[18] In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587-88 (1977), the Supreme Court specifically relied on Lone Wolf in holding that the absence of Indian consent did not defeat congressional intent to diminish or disestablish a reservation. See also Solem v. Bartlett, 465 U.S. 463, 471 n.11 (1984).

> My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage.

Id. at 42 (emphasis added).

The surveying necessary to make allotments to the Indians could not be completed by October 1, 1904, the date fixed in the 1903 Act for opening the Reservation. As a result, in 1904, Congress amended the 1902 and 1903 Acts and extended the time for making allotments and opening the unallotted lands to entry to March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-08. The 1904 Act also appropriated additional funds to complete the necessary surveying and to "otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two . . . as provides for the allotment of the Indians of the Uintah and White River Utes in Utah."[19] All other terms of the 1902 Act, including

[19] The 1904 Act provided in its entirety:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

the language restoring the unallotted lands to the public domain, were left intact.

Once again, however, the time fixed for making allotments and opening the unallotted lands to public entry could not be met. In early 1905, a Senate Resolution directed the Secretary of the Interior to report on the progress that had been made in making the allotments to the Indians under the provisions of the 1902 Act. S. Res., 39 Cong. Rec. 1863 (1905). The Secretary of the Interior responded in a letter, explaining at some length the steps taken "to comply with the provisions of the Act of May 27, 1902" and why the delay in opening the Reservation had occurred. S. Doc. No. 159, 58th Cong., 3d Sess. 1, 2-4 (1905). Attached to the Secretary's letter was a report from the Commissioner of Indian Affairs stating that still more time was necessary to complete the allotment process. Id. at 21-22. Because of the delay, the time for completing the allotments and opening the Reservation had to be extended again.

On March 3, 1905, prior to the date fixed for opening the Reservation by the 1904 Act, Congress enacted the Indian Appropriations Act of 1905. Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. The 1905 Act expressly amended the date fixed by the 1904 Act "for opening to public entry the unallotted lands on the Uintah Reservation" and established September 1, 1905, as the new date "for opening said reservation," but authorized the President to fix the opening at an earlier date.[20] The 1905

---

[20] The pertinent part of the 1905 Act provided:

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered

by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: And provided further, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: Provided, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in

Act also repealed a portion of the 1903 Act that limited the location of the grazing reserve to the lands south of the Strawberry River. In addition, the Act added provisions authorizing the President to set apart Reservation lands for an addition to the Uintah Forest Reserve and for protecting the Indians' water supply or for general agricultural development.

Significantly, the language of the 1905 Act did not provide for the opening of the Uintah Reservation--that was done by the 1902 Act. Rather, the 1905 Act merely provided, "That the time for opening said reservation shall be extended to the first of September, nineteen hundred and five . . . ," and then specified only "the manner of opening . . . ." (Emphasis added.) The position of the Tenth Circuit in Ute Indian Tribe that the 1905 Act "opened" the Reservation simply is not, in our view, consistent with the language of the Act. On its face, the 1905 Act merely set a new date for when the opening was to occur and the manner of such opening. The operative statutory language which actually provided for the opening of the unallotted lands was found in the 1902 Act.

Clearly, nothing in the language of the 1905 Act indicates that Congress intended to repeal either the 1902 Act in total or the language of the 1902 Act restoring the unallotted lands to the public domain. Nor is there anything in the legislative history of the 1905 Act to that effect. On the contrary, in enacting the 1905 Act, Congress acted on the premise that the provisions of the 1902

---

accordance with the provisions of the act opening the reservation.

(Emphasis added.)

and 1903 Acts and the 1902 Joint Resolution continued in effect. Indeed, with surgical precision, Congress expressly repealed a specific, but minor, part of the 1903 Act dealing with the location of the grazing reserve.

The language of the 1905 Act shows that Congress intended to amend the 1902 Act only by limiting "the manner of opening" the lands. The Act restricted initial entry on the opened lands to settlement under the homestead and town-site laws for a period of five years; after that, the lands were to be sold for cash in parcels not larger than 640 acres. The purpose of the amendment was to prevent the opened lands from falling into the hands of land speculators and to assure that the opened land would initially be used for agricultural purposes. See 39 Cong. Rec. 1185-86 (1905); Indian Appropriation Bill, 1906: Hearings before the Subcomm. of the Comm. on Indian Affairs of the Senate, 58th Cong., 3d Sess. 29-30 (1905).

The temporary limitation on the manner of entry under the homestead and town-site laws was patterned after the scheme used in the opening of the Rosebud Reservation. See 39 Cong. Rec. 1183 (1905). In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 608 (1977), the Court set out section 2 of the 1907 Act that was at issue there:

> Section 2 provides for the disposition of lands under the "general provisions of the homestead and town-site laws," while § 3 specifies land purchase prices, with the proviso that "any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to

the highest bidder for cash, without regard to the above minimum limit of price."

The Court saw nothing inconsistent with the diminishment of the Rosebud Sioux Reservation and the provisions temporarily limiting entry into the opened lands. Id. at 609. Similarly, in DeCoteau v. District County Court, 420 U.S. 425, 442, 449 (1975), the Court held that an 1891 Act terminated the Lake Traverse Indian Reservation despite a provision in the Act opening lands "only to entry and settlement [at $2.50 per acre] under the homestead and townsite laws of the United States."

In sum, the language and legislative history of the 1905 Act show that Congress intended only to amend specific aspects of the 1902, 1903, and 1904 Acts and to provide additional authority to the President to set aside Reservation lands for specific uses. Except as specifically amended, Congress did not intend to change the basic features of the 1902 and 1903 Acts.[21] All language in the earlier Acts not specifically amended or repealed remained part of the statutory scheme dealing with the opening of the Reservation. Thus, after enactment of the 1905 Act, the 1902 Act remained in full force and effect with respect to (1) providing for allotments to heads of households and members of the Uintah and White River Tribes and for the amount of acreage for each allotment; (2) restoring the unallotted lands to the public domain; (3) fixing the price to be paid per acre by homesteaders; (4) providing how and to whose benefit the proceeds derived from the

[21] Unlike the 1902 and 1903 Acts, the 1904 Act added nothing substantive to the overall statutory scheme. It only extended the time for the opening.

sale of the unallotted lands were to be applied; and (5) protecting certain mineral rights. Of course, the provision in the 1902 Joint Resolution establishing the grazing reserve also remained in effect, although the 1905 Act repealed one minor aspect of the 1903 Act having to do with the location of the reserve.

We conclude that the 1902 Act established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation. The congressional intent to diminish, as well as other essential aspects of the opening of the Reservation that were established by the 1902 Act, remained in full force and effect through the enactment of the 1902 Joint Resolution and the 1903, 1904, and 1905 Acts. The 1902 Act established more than a "baseline purpose" of restoring unallotted, unreserved lands to the public domain. See Rosebud, 430 U.S. at 592. The Act, on its face, provided for the opening of the Uintah Reservation. In short, the restoration language of the 1902 Act was operative statutory language when the opening finally occurred in 1905.

3. Contemporaneous and Subsequent Construction of the 1902 and 1905 Acts

The conclusion that the 1902 Act established the basic principles governing the opening of the Uintah Reservation is confirmed by subsequent presidential proclamations, congressional acts, executive department orders, and court decisions.

As stated earlier, the 1905 Act authorized the President to open the Reservation prior to September 1, 1905. The

actual opening of the Reservation was effectuated by the Presidential Proclamation of July 14, 1905, 34 Stat. 3119. The Proclamation expressly recognized the continuing operative effect of the 1902 Act and the public domain language therein, as well as the amendatory nature of the 1903, 1904, and 1905 Acts. The Proclamation stated that the time for opening the unallotted lands of the Uintah Reservation had been extended by the 1903, 1904, and 1905 Acts. More importantly, the Proclamation recognized the disestablishment of the Reservation as to the unallotted lands by quoting the language of the 1902 Act that the unallotted lands in the Uintah Reservation "'shall be restored to the public domain.'" The Proclamation also quoted the language in the 1902 Act that fixed the price to be paid for homesteaded land: "'persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre.'"[22] The Proclamation stated in pertinent part:

> Whereas it was provided by the Act of Congress, approved May 27, A. D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre."

[22] That the 1905 Act failed to fix a specific price to be paid for opened lands does not militate against diminishment. See Solem, 465 U.S. at 471; Rosebud, 430 U.S. at 596 n.18.

> And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069) . . . .
>
> . . . .
>
> Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States . . . .

Id. at 3119-20 (emphasis added).

By quoting the language from the 1902 Act that "restored" the unallotted land to "the public domain" and fixed the price to be paid per acre by homesteaders, the Proclamation demonstrates that the President deemed both provisions to be operative statutory positions govern-

ing the opened lands. The additional citation to the 1903, 1904, and 1905 Acts indicates that the President considered all four Acts relevant to the opening of the Reservation to public entry. The presidential conclusion that the 1902 Act restored the opened land "to the public domain" is an unambiguous and contemporaneous statement by the nation's Chief Executive as to how the 1902 and 1905 Acts should be construed and is therefore entitled to significant weight. See Rosebud, 430 U.S. at 602-03.

In addition, the Presidential Proclamation of September 1, 1906, 34 Stat. 3228, confirms the proposition that Congress intended that the unallotted lands be restored to the public domain and that the Reservation be diminished under the 1902 Act. The 1906 Proclamation dealt with a homestead entry that infringed on the Indian grazing reserve established by the 1902 Joint Resolution, as amended by the 1903 and 1905 Acts. The Proclamation adopted essentially the same construction of the operative Acts as the 1905 Proclamation. It implicitly recognized the diminishment of the boundaries of the Reservation by referring to the "former Uintah Indian Reservation in Utah" and by "restor[ing]" a small parcel of land from the grazing reserve "to the public domain" so as to make it subject to entry. The parcel had been erroneously located on a small part of the reserve and had been improved by the homesteader. Had the surplus reservation lands not been restored to the public domain by the 1902 Act, it would have been pointless to transfer the parcel from the grazing reserve to the public domain. The Proclamation stated:

> WHEREAS, the Secretary of the Interior, on July 11, 1905, under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998) and March 3, 1905 (33 Stats., 1048, 1069), reserved certain lands in the former Uintah Indian Reservation in Utah, including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:
>
> Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in me vested, do hereby declare and make known that the lots numbered 2 and 13 of Section 10, Township 2 S., of Range 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.

(Emphasis added.)

Congressional enactments after 1905 dealing with the Reservation were also based on the premise that the public domain language in the 1902 Act diminished the

Reservation's boundaries. In every instance of which we are aware, the 1903, 1904, and 1905 Acts were viewed as amendatory and supplementary to the 1902 Act and as consistent with the proposition that the opened lands had been restored to the public domain.

A 1906 Act extended the time for homesteaders to establish their residence on the opened lands. Act of January 27, 1906, 34 Stat. 9. The Act specifically referred to the unallotted Uintah Reservation lands as "heretofore a part of the Uinta Indian Reservation, within the counties of Uinta and Wasatch, in the State of Utah, opened under the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, and March third, nineteen hundred and five." (Emphasis added.) Similarly, in 1912, Congress provided an extension of time to make payment and proof of entry for "any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto . . . ." Act of July 20, 1912, ch. 244, 37 Stat. 196-97 (emphasis added).

Both the 1906 and the 1912 Acts are similar to a 1905 Act discussed in Rosebud that extended the time for settlers to establish homesteads on former lands of the Rosebud Sioux Reservation. That Act referred to "'lands which were heretofore a part of the Rosebud Indian Reservation.'" Rosebud, 430 U.S. at 603 n.25 (emphasis in original). The Supreme Court characterized this statutory language as "additional evidence of the congressional intent to disestablish." The same conclusion applies here.

The Indian Appropriations Acts of 1910 and 1911 provide still further evidence of diminishment. The 1910 Act appropriated $5000 for the straightening of the Duchesne River "to be reimbursed to the United States out of the proceeds of the sale of lands within the ceded Uintah Indian Reservation opened to entry under the Act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) Similarly, the 1911 Act provided $15,000 to build a bridge across the Duchesne River. Act of March 3, 1911, ch. 210, 36 Stat. 1073-74. The funds were to be reimbursed to the United States from the "sale of lands within the ceded Uintah Indian Reservation open to entry under the act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) The term "ceded" in the 1910 and 1911 Acts may be technically misused, but in the context of the Acts, the term clearly refers to land that was detached from the Reservation by the 1902 Act. See Rosebud, 430 U.S. at 597-98.

The 1910 Act also appropriated funds to pay the Indians for land in the "former Uintah Indian Reservation" that was set apart by the President under the authority of the 1905 Act for reservoir and irrigation purposes in connection with the Strawberry River reclamation project.[23] Act of April 4, 1910, ch. 140, 36 Stat. 284-85. The funds that were to be paid the Indians for this land were to be provided by the owners of the lands irrigated by the project. The 1910 Act also provided, "All right, title, and

---

[23] Pursuant to the authority of the 1905 Act, the President withdrew 56,000 acres for the Strawberry River reclamation project. Presidential Proclamation of August 3, 1905, 34 Stat. 3141. This withdrawal diminished the Reservation. See Ute Indian Tribe, 716 F.2d at 1314, rev'd on other grounds, 773 F.2d 1087.

interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project." 36 Stat. 285.

The use of extinguishment language in the 1910 Act does not support a conclusion that Congress would have used this type of explicit language of diminishment in the 1902 Act if Congress had intended to diminish the Reservation. The lands that were detached from Indian ownership and jurisdiction under the 1910 Act passed directly from the Reservation as it existed after 1905 to a specific type of private use and did not ever become part of the public domain. Indeed, because of the specified use to which the detached lands were put, it would have been inappropriate to restore those lands to the public domain. For that reason, the more explicit diminishment language in the 1910 Act was necessary.

Statements of executive department officials and congressional committees have also consistently concluded that the opened lands were restored to the public domain by the 1902 Act. In 1911, E. P. Holcombe and James M. McLaughlin filed a report with the Department of the Interior concerning the Uintah Reservation. The report stated that on July 14, 1905, "the President issued a proclamation opening the lands to entry August 28, 1905, . . . and there were restored to the public domain to be disposed for the benefit of the Indians about 1,004,005 acres."[24] H.R. Doc. No. 892, 62d Cong., 2d Sess. 1-2

[24] We note that this acreage figure is difficult to reconcile with other figures in this opinion dealing with the amount of land restored to the public domain, see supra at 8-9 & n.10, and appears inaccurate.

(1912). A 1941 report of the Senate Committee on Indian Affairs, issued before the 1945 Order of Restoration, discussed infra, and before the addition of the Hill Creek Extension, stated:

> The Uintah and Ouray Indian Reservation was established in 1861 for the Uintah, Uncompahgre, and White River Bands of Ute Indians. The original area of the reservation was approximately 2,039,040 acres. Cessions were made to the United States at various times so that at present the reservation embraces but 366,000 acres or less than one-fifth of the original.

S. Rep. No. 243, 77th Cong., 1st Sess. 3 (1941); see also, H.R. Rep. No. 2047, 69th Cong., 2d Sess. 2 (1927); H.R. Rep. No. 2503, 82d Cong., 2d Sess. 2, 3 (1952).

Official action of the Secretary of the Interior also provides persuasive evidence of executive department recognition of diminishment. In 1934, Congress authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States . . . ." Act of June 18, 1934, ch. 576, 48 Stat. 984. In 1945, the Secretary of the Interior issued an "Order of Restoration" pursuant to the 1934 Act that restored to the Uintah Reservation 217,000 acres of the undisposed, opened lands that remained in the public domain. That Order restored both the ownership of those lands to the Tribe and, by making the lands part of the

Reservation, the tribal jurisdiction over them. The Order stated:

> Whereas, pursuant to the provisions of the act of May 27, 1902 (32 Stat., 263), as amended, the unallotted lands of the Uintah and Ouray Indian Reservation in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and
>
> Whereas, there are now remaining undisposed of within said area approximately 217,000 acres of unallotted lands, which need closer administrative control in the interest of better conservation practices, and
>
> Whereas, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within this class of undisposed-of opened land, and
>
> Whereas, the Tribal Council, the Superintendant of the Uintah and Ouray Agency, and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of surplus unallotted lands in the said reservation,
>
> Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that the restoration to tribal ownership of all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation will be in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and are added to and made a part of the existing reservation, subject to any valid existing rights.

Order Notice, 10 Fed. Reg. 12,409 (1945) (emphasis added).

The law is clear that if mere legal title to opened surplus lands passed to non-Indians, such lands remained part of the reservation, and restoring the opened lands to tribal ownership would have no effect on their status as reservation lands, since by definition they never left the reservation. But if tribal boundaries were diminished when the surplus lands were opened, the return of those lands to the reservation would enlarge the boundaries of the reservation. See Solem, 465 U.S. at 467-68. Thus, in restoring both the ownership of and the jurisdiction over the lands to the Tribe, the 1945 Order of Restoration was premised squarely on the proposition that the 1902 Act disestablished the Reservation as to the opened lands.

More recent evidence that the restoration language of the 1902 Act was operative at the time of the opening is found in a 1971 order of the Secretary of the Interior revoking a 1930 withdrawal of oil shale lands because the initial withdrawal had clouded title to part of the Uintah Reservation grazing and timber reserve, the allotted lands, and the lands restored to the public domain by the 1902 Act and later restored to the Reservation under the 1945

Order of Restoration. Order Notice, 36 Fed. Reg. 19,920 (1972). The 1971 Order recited the legal history of the Reservation, including the restoration of the "unallotted lands of the Uintah and Ouray Indian Reservation . . . to the public domain." Part of the Order stated:

> Whereas, pursuant to the provisions of the Act of May 27, 1902 (32 Stat. 263), as amended and supplemented by the Acts of March 3, 1903 (32 Stat. 998); April 21, 1904 (33 Stat. 207); March 3, 1905 (33 Stat. 1069); and May 14, 1920 (41 Stat. 599); most of the unallotted lands of the Uintah and Ouray Indian Reservation in Utah were restored to the public domain with the proceeds from the sale of said lands to be used for the benefit of the Indians . . . .

In addition, both the Department of Justice and the Ute Tribe have formally stipulated that the unallotted, opened lands were restored to the public domain by the 1902 Act. In its amicus brief filed in connection with the petition for a writ of certiorari in Ute Indian Tribe, the Department noted that both it and the Uintah and White River Bands of Ute Indians had stipulated that the Indians on the Uintah-Ouray Reservation "'received individual allotments thereon pursuant to the Act of May 27, 1902, as amended,' and that surplus lands were 'restored to the public domain' pursuant to the 1902 Act 'and amendments thereto.'"[25] The stipulation was filed with the Court of Claims

---

[25] Brief of the United States in opposition as Amicus Curiae, Utah v. Ute Indian Tribe, on petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 13 n.7, cert. denied, 479 U.S. 994 (1986). The

in conjunction with the litigation in Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957).

The Ute Tribe has also acknowledged that the Reservation had been diminished. The Tenth Circuit's panel opinion in Ute Indian Tribe stated:

> [T]he 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties [was] reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.").

Ute Indian Tribe v. Utah, 716 F.2d 1298, 1313 (10th Cir. 1983), vacated, 773 F.2d 1087 (10th Cir. 1985) (en banc).

Department of Justice stated in its amicus brief, "The quoted passages do not suggest that the 1902 Act was the sole basis for allotment and opening; to the contrary, they make clear that the substantive provisions of the 1902 Act were 'amended.'" That point, however, has never been contested. What is significant is that the Department formally acknowledged in court that the surplus lands had been restored to the public domain pursuant to the 1902 Act and the amendments thereto.

As recently as 1977, the Forest Service took the position that the Ashley and Uintah National Forests and the High Uintah Wilderness were not part of the Reservation because "the original Uintah Reservation boundaries were disestablished and present Reservation boundaries include only the trust lands."[26] Moreover, Department of Interior officials have consistently viewed only the trust lands (the tribal grazing reserve, allotments, and land later restored to tribal ownership and reservation status) as the lands that lie within the Reservation.[27]

Finally, a number of court decisions have also stated or held that the language in the 1902 Act restoring the unallotted lands to the public domain was operative when the Reservation was opened in 1905 and that the 1905 Act simply extended the time for opening the unallotted, unreserved lands to public entry. In Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), the issue was whether an

---

[26] Brief of Duchesne and Uintah Counties as Amici Curiae, at 16 (quoting Letter from United States Forest Service to Scott M. Matheson, Governor of Utah (April 8, 1977)).

[27] H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C. F. Darrabee, Acting Commissioner of Office of Indian Affairs to H. C. Means, Superintendent of Irrigation Survey, Whiterocks, Utah 1-2 (September 26, 1907); Letter from First Assistant Secretary of Department of the Interior to Commissioner of Indian Affairs (November 8, 1907); Letter from Secretary of the Department of the Interior to Secretary of the Treasury (December 19, 1908); 1929 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1; 1931 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 4-6; 1932 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1-2; Bureau of Indian Affairs, Phoenix Area Office, Information Profiles of Indian Reservations in Arizona, Nevada, & Utah 155 (1976).

application was properly made to the Utah State Engineer for an award of water rights to be used on land that was opened to public entry in 1905. This Court reviewed the statutes dealing with the opening of the Reservation, beginning with the 1902 Act, and stated:

> It may be judicially noticed, and here stated, that Congress in 1902 ordered the unallotted lands of the Indian reservation referred to in the complaint to be restored to the public domain on the 1st day of August, 1903. That time was extended to October 1, 1904, and again to March 10, 1905. On March 3, 1905, Congress again extended such time to September 1, 1905, but authorized the President of the United States by proclamation to fix an earlier time. Thereupon, the President, on the 14th day of July, 1905, issued a proclamation restoring the unallotted lands of the reservation to the public domain, and declaring such lands open to entry, settlement, and disposition on and after the 28th day of August, 1905.

108 P. at 1114. Although it cannot be said, as a technical matter, that the Sowards opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain, it is clear that this Court held that the 1905 Act amended the 1902 Act and that the 1902 Act restored the open, unallotted lands to the public domain. See also White Rocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459, 460 (1914).

The Court of Claims' opinion in Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl.

1 (1957), reached the same conclusion. That case awarded compensation to the Uintah and White River Utes for the withdrawal by the United States of the lands that were set apart and added to the Uintah Forest Reserve pursuant to the 1905 Act. In the course of the opinion, the court stated that after the allotments to the Indians were made, the surplus lands were opened to public entry and the proceeds from these lands totalling $1,184,996.33were credited to the account of the Uintah and White River Utes. Id. at 22. With respect to the 1902 Act, the court stated that "surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians." Id.

The same construction was placed on the 1902 and 1905 Acts by the Court of Appeals for the Tenth Circuit in Hansen v. United States, 153 F.2d 162 (10th Cir. 1946). Hansen held that the 1902 Act restored the unallotted lands "to the public domain" and that the 1903, 1904, and 1905 Acts "extended the time for opening the unallotted lands to the public domain." Id. at 163. This opinion was handed down just a few months after the 1945 Order of Restoration by the Secretary of the Interior and apparently without knowledge of it, for the Court noted, "Approximately 220,000 acres of the lands restored to the public domain by the Act of May 27, 1902, remain undisposed of." Id.

In United States v. Boss, 160 Fed. 132 (D. Utah 1906), the United States District Court for the District of Utah dismissed an indictment which charged that the defendant knowingly introduced intoxicating liquor into Indian

country in violation of federal law. The crime had occurred after the opening of the Uintah Reservation in 1905 on unallotted land that had been reserved by the Secretary of the Interior for school and Uintah Agency purposes. The court traced the legislative history of the Uintah Reservation, including the interdependence of the 1902 and 1905 Acts, and found Ex parte Dick, 141 Fed. 5 (9th Cir. 1905), rev'd on other grounds, 202 U.S. 132 (1906), dispositive. In Dick, the Ninth Circuit vacated the federal conviction of a defendant for knowingly introducing intoxicating liquor into Indian country because the crime had occurred on land over which the state had exclusive jurisdiction. The sale of liquor in Dick occurred on Nez Perce Reservation land that had been ceded to the United States by a congressional act and sold to a municipal corporation. The court concluded, "In the present case, the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state, and outside the jurisdiction of the United States." Dick, 141 Fed. at 8. Thus, Boss's dismissal of the indictment for lack of federal jurisdiction and its reliance on Dick implicitly acknowledged that the unallotted lands of the Uintah Reservation had been restored to the public domain and were therefore subject to the state's exclusive jurisdiction. See also United States v. Fitzgerald, 201 Fed. 295, 296 (8th Cir. 1912) (referring to "the former Uintah Indian Reservation").

In sum, Congress, the President, executive department agencies, including the Department of Justice, the Department of the Interior, the Bureau of Indian Affairs, and the Forest Service, the courts, and the Ute Tribe itself have acted on the premise that the restoration language in the 1902 Act restored the unallotted, surplus land in the

Uintah-Ouray Indian Reservation to the public domain when the Reservation was finally opened in 1905 and diminished the Reservation as to that land.

III. CONCLUSION

The 1902, 1903, 1904, and 1905 Acts, carefully analyzed, require the conclusion that the restoration language in the 1902 Act continued in operative effect as part of the scheme for opening the Reservation and that the 1905 Act simply amended and supplemented the 1902 Act. The 1905 Act did not restate the proposition that the unallotted, unreserved lands were restored to the public domain. Nor did it restate several other legal principles established in the 1902 Act that also governed the opening of the Reservation. As an act that amended and supplemented the 1902 Act, there was no need for the 1905 Act to restate that which was already established. Simply stated, the 1905 Act did not stand alone in opening the Reservation; it only extended the time for opening the Reservation under the 1902 Act and provided for the manner of the opening. The fact that the 1905 Act allowed settlement on the opened lands only under the homestead and town-site acts for a period of five years does not compel a different conclusion, nor does the fact that the Uintah and White River Utes were not paid a sum certain for the opened lands. Because the restoration language in the 1902 Act was never repealed, it remained in effect, and the Reservation was diminished. This case cannot therefore be disposed of under the rulings in Rosebud, Mattz, and Seymour that surplus land acts that simply "open" reservation lands to entry by non-Indians do not diminish the reservation.

In conclusion, we hold that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by the 1902 Act, as amended by the 1903, 1904, and 1905 Acts, and that the Reservation boundaries were diminished by that restoration. The Reservation boundaries were further diminished by the withdrawal for the Strawberry River reclamation project and later enlarged by the 1945 Order of Restoration and the 1948 Hill Creek Extension.[28] Since Myton, Utah, lies outside

---

[28] We do not address the issue of whether the 1905 addition to the Uintah National Forest diminished the Reservation. The Tenth Circuit en banc decision in Ute Indian Tribe held that it was not thereby diminished, 773 F.2d at 1089-90; id. at 1099-1101 (Seymour, J., concurring), whereas that court's panel decision and the decision of the United States District Court for the District of Utah held otherwise. 716 F.2d at 1313-14; 521 F. Supp. at 1136-37. It is significant to note that the 1905 Act, which granted the President the authority to reserve unallotted lands in the Reservation as an addition to the Uintah Forest Reserve, specifically provided that such lands would be "subject to the laws, rules, and regulations governing forest reserves . . . ." 33 Stat. 1070. The full text of the statute is set out at n.20 supra. It was pursuant to this statutory authority that President Roosevelt withdrew 1,010,000 acres from the Uintah Reservation for the national forest by the Proclamation of July 14, 1905, 34 Stat. 3116. The administrative authority over these lands was transferred from the Secretary of the Interior and the Bureau of Indian Affairs to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected to the jurisdiction of the Forest Service. In his dissenting opinion in Ute Indian Tribe, 773 F.2d at 1115, Judge Seth stated that Congress clearly evidenced an intent to remove the lands from the Reservation by the transfer of reservation status and administrative authority. See also United States v. Gimmell, 535 F.2d 1145, 1149 (9th Cir. 1976) (continuous use of forest land for conservation and recreation strongly suggests extinguishment of Indians' title). The Utes were paid $1,217,000 in compensation for the forest reserve lands. See Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 7, 27-29 (1957).

the boundaries of the Reservation so described, it is not within Indian country. Therefore, the district court had subject matter jurisdiction over the burglary and the prosecution of Clinton Perank.

Affirmed.

WE CONCUR:

_____
Gordon R. Hall, Chief Justice

_____
Richard C. Howe, Associate
Chief Justice

_____
Christine M. Durham, Justice

ZIMMERMAN, Justice: (Dissenting)

I dissent. I cannot join the majority in interpreting a federal statute that affects the boundaries of the Uintah-Ouray Indian Reservation in a way which contradicts the construction approved by a majority of the entire United States Court of Appeals for the Tenth Circuit. I find almost incredible the refusal of the majority of this court

to accord comity to a federal court's decision in an area in which the federal government has preeminent authority and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years--a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation. This litigation certainly will not end here, now that there is a square conflict between the entire Tenth Circuit and this court. But this tactical victory for the State comes at an unacceptably high cost to the relationship between the state and federal judiciaries. Moreover, on the merits, I think the majority reaches the wrong result.

This case arises in the context of Clinton Perank's appeal challenging Utah's assertion of criminal jurisdiction over him. The State has taken advantage of Perank's appeal from a relatively minor criminal conviction to relitigate the question of the Uintah-Ouray Indian Reservation boundaries. In a separate federal proceeding seven years ago, the Tenth Circuit decided these boundaries against the State. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Now, the State seeks to reopen the boundary issue in a new forum.

I would object to the State's opportunistic misuse of Perank's petty criminal prosecution to readjudicate a settled issue under any circumstance, but the unequal and inadequate briefing of the boundary issue in this case makes it a particularly poor vehicle for bringing us into a direct confrontation with the Tenth Circuit. Perank's brief contained a total of six pages of argument, the bulk of it

concerning his assertion that he is an Indian. He allotted fewer than two pages to jurisdictional and boundary issues. In contrast, the State filed a fifty-page brief, devoting the majority of it to an attack on the Tenth Circuit's decision in Ute Indian Tribe and to a reargument of the boundary issue. In addition to the disparate treatment of the boundary issue by the immediate parties, Uintah and Duchesne Counties, which were also parties to the Tenth Circuit action, lodged a seventeen-page amicus brief supporting the State's position. Recognizing the one-sidedness of the proceeding, the State's counsel acknowledged at oral argument that perhaps the State's real adversary in this case--the Tenth Circuit--was absent.

We made an attempt to cure the one-sidedness of the briefing by soliciting participation by other parties with interests in this case. Unfortunately, we met with little success. At our invitation, the Ute Indian Tribe filed an amicus brief. However, apparently believing that we would not consider overturning the result of the Tenth Circuit's en banc decision, the Tribe, rather than addressing the impact of the Tenth Circuit's decision on our consideration of the issue or the merits of the boundary dispute, argued only that Perank was not a member of the Tribe and was therefore not in a position to challenge the state court's jurisdiction over him.

The week before argument, we contacted the State and encouraged it to inform the United States Attorney of the upcoming argument and to inquire whether the Justice Department wished to present its position before this court. The Justice Department did not appear at argument. We then invited the Justice Department to brief its position as an amicus. However, the Justice Department,

demonstrating a surprising lack of interest in the case, refused to brief the matter and submitted only the brief it had filed years earlier in opposition to the State's petition for a writ of certiorari to the Tenth Circuit in Ute Indian Tribe. Thus, the State's arguments on the boundary question were virtually unchallenged.

Notwithstanding the lack of a true adversary proceeding on the boundary issue, the majority eagerly proceeds to the merits of the boundary dispute and takes a position contrary to that of a majority of the entire Tenth Circuit. I would find a direct confrontation with the Tenth Circuit on an essentially federal issue something to be avoided under any circumstances, but this court's rush to adjudicate the issue is especially egregious given the importance of this question and the fact that the interests of all parties affected in the proceeding are not fairly before this court.

The reason I would not reach the merits of the boundary issue can be summed up in one word: comity. Under the doctrine of comity, courts of one jurisdiction will give effect to the laws and judicial decisions of another out of deference and mutual respect. See, e.g., Pan Energy v. Martin, 813 P.2d 1142, 1146 (Utah 1991); Tracy v. Superior Court, 810 P.2d 1030, 1041 (Ariz. 1991); Perrenoud v. Perrenoud, 480 P.2d 749, 760 (Kan. 1971); In re Custody of Sengstock, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991). See generally 21 C.J.S. Courts § 210 (1990). The scope and applicability of the comity doctrine are committed to the sound discretion of each court. See, e.g., Pan Energy, 813 P.2d at 1146; State ex rel. Speer v. Haynes, 392 So. 2d 1183, 1185 (Ala. Civ. Ct. App. 1979), rev'd on other grounds sub nom. Ex Parte Haynes, 392 So. 2d 1187 (Ala. 1988); Tracy, 810 P.2d at 1041; Philadelphia v. Austin, 429

A.2d 568, 572 (N.J. 1981); Sheridan v. Sheridan, 223 N.W.2d 557, 560 (Wis. 1975). The instant case presents compelling reasons to follow the rules of comity and defer to the Tenth Circuit's resolution of the boundary issue.

As a general proposition, we should defer to decisions of coordinate courts that have resolved the precise issue we face, unless doing so would contravene the laws or policy of this state. See, e.g., Philadelphia, 429 A.2d at 572; In re Custody of Sengstock, 477 N.W.2d at 314. Although we have an interest in determining the scope of our own jurisdiction, I know of no existing state law or policy that would preclude us from deferring to the Tenth Circuit's determination of the boundaries of the Uintah-Ouray Indian Reservation.[1] For example, if we were to defer to the Tenth Circuit's decision, the result would not leave a jurisdictional void resulting in wrongs to this state or its citizens that would go uncompensated or unpunished. The Ute Indian Law and Order Code provides the courts of the Ute Indian Tribe with jurisdiction over civil and criminal matters occurring on the reservation and

[1] In footnote two of the court's opinion, the majority states that the Justice Department "failed to recognize that the Tenth Circuit's en banc decision in Ute Indian Tribe was in conflict with prior decisions of this [c]ourt." The majority then cites Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), and White Rocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914). Yet as the majority itself recognizes, "it cannot be said, as a technical matter, that the Sowards opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain." The same observation holds true for White Rocks Irrigation Co. Consequently, the implication of the majority opinion in footnote two--that this court has previously ruled on the issue at bar and that the majority opinion is, in part, following established precedent--is simply incorrect.

recognizes the jurisdiction of other forums where the Tribe does not have jurisdiction. See The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah § 1-2-5. And we have spoken before of the need to recognize Indian tribes as sovereigns that are entitled to a presumption of legitimacy insofar as the exercise of their judicial power is concerned. See In re Adoption of Holloway, 732 P.2d 962, 968 (Utah 1986); cf. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48-49 (1989) (approving Holloway).

But even if there were some presumption that we should reexamine a federal court determination of the jurisdiction of Utah courts--a proposition neither the State nor the majority advances--the circumstances of this case are more than sufficient to show that such a redetermination is inappropriate. First, comity concerns are heightened here where we are asked to revisit issues of federal law, decided on defensible bases by coordinate federal courts,[2] for the sole purpose of creating a conflict with the federal courts to force Supreme Court review. "Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and

[2] See, e.g., Hall v. Nomura Securities Int'l, 268 Cal. Rptr. 45, 49 (Ct. App.), reh'g denied (June 20, 1990); Bouwman v. Department of Social Servs., 375 N.W.2d 806, 808 (Mich. Ct. App. 1985); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1244 (N.J. 1990); Van De Hey v. United States Nat'l Bank of Oregon, 793 P.2d 1388, 1390 (Or. Ct. App. 1990), aff'd, 313 Or. 86, __ P.2d ___ (1992); State v. Goodell, 734 P.2d 10, 11-12 (Or. Ct. App.), rev. denied, 737 P.2d 1248 (Or. 1987). See generally Note, Authority in State Courts of Lower Federal Court Decisions on National Law, 48 Colum. L. Rev. 943 (1948); Annotation, Duty of State Courts to Follow Decisions of Federal Courts, Other Than the Supreme Court, on Federal Questions, 147 A.L.R. 857 (1943).

to promote a decent and orderly administration of justice." 21 C.J.S. Courts § 210 (1990). Instead of seeking to further the interests of comity--prevention of a direct jurisdictional clash and promotion of the uniform administration of justice--the majority's decision to reach and redecide the merits of the boundary question needlessly upsets a previously settled area of law and achieves the opposite effect. Today's decision encourages litigants to forum shop in the hope of inconsistent decisions, an ill comity seeks to avoid in the federal-state context.[3] See Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1244 (N.J. 1990)

An additional reason for applying principles of comity is to recognize the unique role of federal law in regulating Indian lands and interests. Because of this unique role, "federal courts are the ultimate decision maker as to whether federal, state or tribal courts have jurisdiction in a particular Indian law case." State v. Daly, 454 N.W.2d 342, 344 (S.D. 1990). The primacy of federal authority in this area stems from at least three sources: the Constitution, the federal statute that admitted Utah to the Union, and the special relationship assumed by the federal government toward Indian tribes.

---

[3] The application of comity principles in the federal-state context is not new to this state. On at least one occasion of which I am aware, this court has recognized the appropriateness of deferring to federal court interpretations of federal law. See Kuchenmeister v. Los Angeles & S.L.R.R., 52 Utah 116, 122, 172 P. 725, 727 (1918); cf. Antillon v. Department of Employment Sec., 688 P.2d 455, 457 (Utah 1984) (holding that state court must follow federal court decision construing analogous statute from another state where statutes were enacted as condition of continued federal approval of state unemployment compensation programs).

The Constitution makes the federal government supreme in dealings with Indian tribes. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). Section 8 of Article I gives the federal government power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."[4] U.S. Const. art. I, § 8, cl. 3. This provision implicitly recognizes that Indian tribes are quasi-sovereign entities with sui generis status as "domestic dependent nations" under federal law. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). As an aspect of their inherent sovereignty, tribes exercise powers of self-government. United States v. Wheeler, 435 U.S. 313, 322-23 (1978). In line with this grant of authority to the national government, state interference in the government-to-government relationship existing between the United States and Indian tribes is generally prohibited except to the extent that Congress has granted the state such authority. See Worcester, 31 U.S. (6 Pet.) at 561-62; Felix S. Cohen, Handbook of Federal Indian Law 259 (1982) [hereinafter Cohen].[5] This "'policy of leaving

---

[4] The Treaty Clause, U.S. Const. art. II, § 2, and the Supremacy Clause, id. art. VI, cl. 2, are also often cited as sources of exclusive federal power in dealing with Indian tribes. See Felix S. Cohen, Handbook of Federal Indian Law 207-12 (1982).

[5] I recognize that the United States Supreme Court's "more recent cases have recognized the rights of states, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands . . . ." County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, ___ U.S. ___, ___, 112 S. Ct. 683, ___, 116 L. Ed. 2d 687, 697 (1992). However, absent congressional authorization, such state jurisdiction is clearly prohibited to the extent that it "'would interfere with reservation self-government or impair a right granted or reserved [to the tribe] by federal law.'" Id. (quoting Organized Village of Kake v. Egan, 369 U.S.

Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973) (quoting Rice v. Olsen, 324 U.S. 786, 789 (1945)). Recognition of this policy was a condition of Utah's admission to the Union. The Enabling Act states:

> [T]he people inhabiting said proposed State do agree that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

Enabling Act, Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107. I recognize that we have concurrent authority with federal courts to construe federal statutes. However, the constitutional commitment of authority over Indian tribes to the federal government requires that we proceed with special care in cases affecting the tribes. And when a federal court has spoken directly on an issue of Indian law, this care should be transformed to an extreme reluctance to redecide the matter.

The federal government's trust responsibility to Indian tribes also bears on the question of whether we should honor comity principles in this case. Ever since Chief Justice Marshall described the relationship of the tribes to

---

60, 75 (1962)).

the United States as "that of a ward to his guardian," Cherokee Nation, 30 U.S. (1 Pet.) at 16, the trust relationship has been a cornerstone of federal Indian jurisprudence. Cohen at 221. Of similar importance is the well-recognized federal policy of supporting tribal self-government and self-determination. See National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985); Cohen at 349. The federal government's trust responsibility to the tribes and the federal policy supporting tribal self-government and self-determination provide a backdrop against which federal courts resolve Indian issues. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). And it is this perspective that underlies the rule that courts are to interpret statutory provisions affecting Indians in favor of the tribes. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Ute Indian Tribe, 773 F.2d at 1089.[6]

Based on the foregoing considerations, I conclude that comity principles require deference to the Tenth Circuit's disposition of the boundary issue.

---

[6] See also National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) (holding that policy of supporting tribal self-government and self-determination favors rule that provides tribal courts the first opportunity to evaluate factual and legal bases for jurisdictional challenges); Nance v. Environmental Protection Agency, 645 F.2d 701, 710-11 (9th Cir.) (noting that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes" (emphasis in original)), cert. denied sub nom. Crow Tribe of Indians v. Environmental Protection Agency, 454 U.S. 1081 (1981).

Following the course I suggest would not be novel. Several state courts have relied on comity principles in deferring to federal court decisions on Indian law questions. See, e.g., Daly, 454 N.W.2d at 344; State v. Francis, 563 A.2d 249, 253 (Vt. 1989). Indeed, the South Dakota Supreme Court has gone so far as to overrule one of its cases in recognition of a federal court of appeals' ruling concerning South Dakota's jurisdiction over Indians living within the state. State v. Spotted Horse, 462 N.W.2d 463, 467 (S.D. 1990), cert. denied, ___ U.S. ____, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991). Similarly, the Oregon Court of Appeals has overruled one of its prior decisions in order to defer to a federal court of appeals' ruling regarding a tribe's treaty right to fish. State v. Goodell, 734 P.2d 10, 11-12 (Or. Ct. App.), rev. denied, 737 P.2d 1248 (Or. 1987). Although these two courts did not expressly rely on comity principles in their holdings, I see no other obvious bases for the results they reached.

In short, there is well-established precedent for following comity principles in cases such as this.

As a final matter, I register my objection to the majority's treatment of the merits of the boundary issue. Were I to reach the issue, I would follow the exhaustive and thoroughly researched opinions of the federal courts, both trial and appellate. See Ute Indian Tribe, 773 F.2d 1087; Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981). They constitute an adequate remonstrance to the majority's disposition of the issue. Specifically, those decisions followed the approach dictated by the Supreme Court in determining whether the various enactments at issue demonstrated a congressional intent to diminish reservation boundaries. That court has said that, in the

absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." Solem v. Bartlett, 465 U.S. 463, 472 (1984) (emphasis added) (quoted in Ute Indian Tribe, 773 F.2d at 1089); accord Rosebud, 430 U.S. at 586 ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." (Citation omitted)). The Tenth Circuit and the district court viewed the relevant statues with this perspective, see 773 F.2d at 1089; 521 F. Supp. at 1110 n. 118; a close reading of the majority decision here demonstrates that it does not.

There are times when I, as a state court judge, lament what might be fairly characterized as the second-guessing of our decisions by federal courts simply because they do not like a result we may have reached. See, e.g., Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) (disagreeing with State v. Lafferty, 749 P.2d 1239 (Utah 1988)) cert. denied sub nom. Cook v. Lafferty, 112 S. Ct. 1942 (1992). The present case puts that shoe on the other foot, an exercise that may be ironic, but is even less defensible. The federal government is, after all, supreme on questions that fall within its purview. In this situation, federal statutory law is at issue, the federal trust responsibility to the Indian tribe is at issue, and it was the federal courts that adjudicated the boundary question years ago. As of today, federal supremacy and Supreme Court review of this court's decision provides the only remaining hope for the Ute Tribe, one of those "weak and defenseless people who are the wards of the nation, [and who are] dependent

upon its protection and good faith," Rosebud, 430 U.S. at 586, for what little is left of the patrimony they held before the whites came to this continent.

APPENDIX C

United States Court of Appeals,
Tenth Circuit.

Nos. 81-1827, 81-1901.

The UTE INDIAN TRIBE,
Plaintiff-Appellant and Cross-Appellee,
v.
The STATE OF UTAH,
Defendant-Appellee,

Duchesne County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, Duchesne City, a municipal corporation, and Uintah County, a political subdivision of the State of Utah, Defendants-Appellees and Cross-Appellants.

Indian tribe brought action seeking declaratory and injunctive relief establishing exterior boundaries of reservation. The United States District Court for the District of Utah, Central Division, 521 F.Supp. 1072, Bruce S. Jenkins, Chief Judge, determined that except for specific acts, all lands within original boundaries or reservation remained Indian country, and concluded that Uncompahgre Reservation had been disestablished, and appeals were taken. The Court of Appeals, 716 F.2d 1298, affirmed in part and reversed in part. On motion for rehearing, the Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) Uintah Reservation was not diminished, and (2) Uncompahgre Reservation was not diminished.

Affirmed in part and reversed in part.

Seymour, Circuit Judge, filed concurring opinion in which Holloway, Chief Judge, and McKay and Logan, Circuit Judges, joined.

Seth, Circuit Judge, filed dissenting opinion in which Barrett, Circuit Judge, joined.

Daniel H. Israel of Cogswell & Wehrle, Denver, Colo., and Martin Seneca, Reston, Va. (Scott B. McElroy and Julian M. Izbiky of Cogswell & Wehrle, Denver, Colo., and Robert Thompson, Fort Duchesne, Utah, with them on brief), for plaintiff-appellant/cross-appellee Ute Indian Tribe.

Dallin W. Jensen, Sol. Gen., Salt Lake City, Utah (David Wilkinson, Utah Atty. Gen., and Michael M. Quealy, Asst. Atty. Gen., Salt Lake City, Utah, with him on brief), for defendant-appellee State of Utah.

Tom D. Tobin, Tobin Law Offices, P.C., Winner, S.D. (Dennis L. Draney, Roosevelt City Atty., Roosevelt, Utah, Ronald Uresk, Duchesne City Atty., Roosevelt, Utah, and David Albert Mustone, Tobin Law Offices, P.C., Washington, D.C., with him on brief), for defendants-appellees/cross-appellants Cities and Counties.

Carol E. Dinkins, Asst. Atty. Gen., Robert L. Klarquist and Martin Green, Dept. of Justice, Washington, D.C., on brief for amicus curiae U.S.

Before HOLLOWAY, Chief Judge, and SETH, DOYLE, BARRETT, McKAY, LOGAN and SEYMOUR, Circuit Judges.

ON REHEARING EN BANC

WILLIAM E. DOYLE, Circuit Judge.

The above entitled matter was considered by the court en banc on the motion for rehearing. The result was that

the majority of the Judges decided that there should be reconsideration and a different result. It will be recalled that in the dissenting opinion which was written previously, this writer agreed with the position which has been taken by District Judge Jenkins (*Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981), who generally ruled that the Uintah Reservation and its lands remain the property of the tribes that are involved. As to the questions whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that the Indians lost title to these lands, the view of this writer is contrary to the view of the trial court.

I.

THE UINTAH ISSUE

With respect to the case against disestablishment, it was even clearer in connection with the Uintah Indian Reservation than the other areas. The district court pointed out in its opinion that the Act of May 5, 1864, 13 Stat. 64, which established the Uintah Reservation provided that "the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" 521 F.Supp. 1072 at 1111, quoting H.R.Rep. No. 660, 53d Cong., 2d Sess., 1-3 (1894). The Uintah Reservation was thus clearly established as a permanent home for the Ute Tribe. Considering that Congress' intent to establish and set aside the Uintah Reservation was clearly expressed, disestablishment of that reservation would require an equally clear expression of congressional intent to change the status of the reservation.

Recently the Supreme Court decision in *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), clarified that only in two types of situations should courts find that Congress intended to disestablish an Indian reservation. The first of these is when Congress uses explicit

language of cession in an opening act and also gives indication of an unconditional commitment to compensate Indians for their opened lands. 104 S.Ct. at 1166. The other situation is when "events surrounding the passage of a surplus land act, particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* But neither the intent behind the Indian Appropriations Act of 1905, ch. 1479, 33 Stat. 1048, [hereinafter cited as 1905 Act] that allegedly diminished the Uintah Reservation, nor the language used in that Act, is sufficiently clear to support a finding that the Act disestablished or diminished the Uintah Reservation. Indeed the language used in that Act is sufficiently clear to support a finding that the Act did not disestablish or diminish the Uintah Reservation. Neither the language used in that Act nor any other aspect of it gives clear support for a finding that the Act disestablished or diminished the Uintah Reservation. Nor does the legislative history support the allegation approached.

The original opinion, 716 F.2d 1298, in this case inferred, from a series of laws passed between 1902 and 1905, that Congress intended to diminish the size of the Uintah Reservation. The opinion stated that Congress' intent in passing the Indian Appropriations Act of 1902, ch. 888, 32 Stat. 245, [hereinafter cited as 1902 Act] was to disestablish the Reservation and that its original intent carried through to the 1905 Act that actually opened the Reservation to non-Indian settlers. The object of this was certainly different from the conclusion that was set forth. But we now conclude that no intention to alter the Reservation's boundaries was present. Actually the intent was to open the Reservation to non-Indian settlers and this couldn't effect the result that was suggested.

The district court's opinion was indeed well researched on this question, and others as well. The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1903 and 1904 extending the time set for the opening of the Reservation. *See* Indian Appropriations Act of 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.

It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," 716 F.2d at 1312, that carried through into the 1905 Act. To do so is inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.

An examination of the 1902-1905 series of Congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, at 1167, provides inferences against diminishment. The district court's initial decision that the Uintah Reservation was not disestablished or diminished is correct. The strongest inference that is to be drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. With respect to the Reservation's boundaries, the only inference that can be drawn is that Congress had no intention for

them to change. Congress' use of "homestead and township acts" language in the 1905 Act, as contrasted with its use of "public domain" language in the 1902 Act, is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation.[1]

The original opinion's conclusion that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed we accept the district court's view that the Reservation's boundaries were not changed by the 1905 Act.

II.

THE FOREST RESERVE PROBLEM

We will next discuss the status of the 1,010,000 acres of the Uintah Forest Reserve, which was set aside under the authority of the 1905 Act. The Act provided:

> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary.

33 Stat, at 1070.

---

[1] The brief submitted by the Cities and Counties suggests that the 1905 Act necessarily diminished the Uintah Reservation because BIA personnel and local residents immediately thereafter began referring to the "former" reservation. These contemporaneous interpretations of the Act are entitled to little weight. Congress' authority over reservations is plenary, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903), and it is Congress' intent that must govern our decision. The interpretation, wishful or not, given to the 1905 Act by whites living in the Reservation area cannot overcome the lack of compelling evidence that Congress intended to diminish the Uintah Reservation.

There is nothing in the 1905 Act or in its legislative history which establishes a "total surrender of tribal interests" or a "widely-held contemporaneous understanding that the affected reservation would shrink," as required by *Solem*, 104 S.Ct. at 1166. The act merely authorized President Theodore Roosevelt to set apart reservation lands as a forest reserve. This he did. Proclamation of July 14, 1905, 34 Stat. 3113. Indeed the 1905 Act specifically reserved the Utes' timber interests in the lands by authorizing forest officials to sell as much timber as could be safely sold for fifteen years and to pay the money to the Utes. 33 Stat. at 1070.

There is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation. That evidence is shown when the 1905 Act is contrasted with the Act of Apr. 4, 1910, ch. 140, 36 Stat. 269. The latter clearly extinguished a portion of the reservation lands for reclamation purposes. The reclamation lands were originally set aside under the authority of the 1905 Act. This was in the same manner as the forest lands which had been set aside. Yet five years later Congress showed that it could be explicit when it dealt with the reclamation lands. It said: "All right, title and interest of the Indians in the said lands are hereby extinguished, and control thereof shall pass to the owners of the lands irrigated from said project. . . ." 36 Stat. at 285. In contrast, Congress never enacted a subsequent statute extinguishing the Utes' interests in the lands withdrawn for the forest reserve.

Also, when Congress compensated the Utes for 973,779 acres of the forest lands in 1931, it recognized the lands as "belonging to such Indians." Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092.

Despite the fact that neither the language of the 1905 Act nor its legislative history evidences congressional intent to remove the forest lands from the Uintah Reservation, the district court and this court in its original opinion concluded that the reservation had been diminished because withdrawal of lands for a forest reserve was inconsistent with continued reservation status. 521 F.Supp. at 1138; 716 F.2d at 1314. In reaching this decision, both courts stressed that the administrative authority over the forest lands was transferred from the Department of the Interior to the Department of Agriculture. Such a change in the administration of the lands, however, does not rise to the level of a subsequent event establishing clear congressional purpose to diminish, as required by *Solem*, 104 S.Ct. at 1166-67.[2]

We therefore conclude that the Uintah Reservation was not diminished by the withdrawal of the national forest lands.

III.

THE UNCOMPAHGRE RESERVATION

Following rehearing it became necessary to consider the status of the Uncompahgre Reservation in Utah. This is said to be the least popular of the group. The position which is taken by the district court and by this court in the earlier opinion was that the entire Uncompahgre Reservation had been disestablished. However, there is a lack of evidence of this fact unless there can be disestablishment by failure to develop the area. The State of Utah supports the district court's original decision. Under the *Solem* standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question. It must be mentioned, however, that this is, for the most

[2] The applicable forest service laws mentioned in the 1905 Act are limited by 16 U.S.C. § 480, which provides that criminal and civil jurisdiction is not affected by the existence of a national forest. Thus, Indian jurisdiction does extend to Indians on forest lands.

part, a very dry area whose highest value, in addition to agriculture, is its mineral deposits, such as gilsonite, etc. On this account, there is some interest on the part of development parties.

It is interesting to note that there exists no clear expression of congressional intent to disestablish the affected areas, including this one, as contemplated by the court in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

In *Solem* it was found that it was difficult to disestablish an Indian reservation. It went on to say Congress must "clearly evince" an intent to change boundaries before diminishment will be found. *Id.* The *Solem* test for determining whether tracts remain a reservation emphasizes this factor. The *Solem* court also stated that subsequent events such as demographic transformations of the area should be examined and regarded. However, subsequent events should be assessed to a "lesser extent" than the statutory language and surrounding circumstances. *Id.* .

We now turn to apply these principles to the 1894 and 1897 Acts.

In 1894, bills were introduced providing "for opening the Uncompahgre and Uintah Reservations." H.R. 4511, 6557, 53d Cong. 2d Sess. (1894); see S.Rep. No. 450, 53d Cong., 2d Sess., 4027 (1894). It is to be noted that these bills were never enacted. However, the Indian Appropriations Act for 1894 included H.R. 6557, with changes. We first consider the 1894 Act's operative language, set forth below.[3]

[3] Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows: Allotments in severalty of said lands shall be made as follows: To each head of a family one-

The 1897 statute which ultimately opened the Uncompahgre Reservation provided:

> The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncom-

quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided*, That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: *And Provided*, That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

Sec. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided*, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances. *Provided*, That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed

> pahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

We mentioned above that there is some interest due to the presence of minerals and it should be mentioned here that the land contains gilsonite and other minerals and unquestionably there is more interest in these features than in limited agricultural activites that have operated in the area.

The question as to whether the statutory language of the 1894 and 1897 acts disestablished the Uncompahgre Reservation calls for an interpretation based on historical research. This court's previous opinion concluded that the statutory language of the 1894 Act established a "baseline" purpose to disestablish which the 1897 Act executed. 716 F.2d at 1306. The opinion read the term "restore to public domain" in the 1894 Act as an indication of a clear congressional intent to remove the Uncompahgre land from the Indians. Our conclusion is that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb

---

for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

the ownership of the land by the tribal group. There are several competing meanings that could be implied from the phrase "restore to the public domain." But the most important one is that it permits the invasion of an area and purchase of land and general utilization. It is said that it is equally plausible that the phrase means that Indian lands would be available for settlement, but that the boundaries remain unchanged. The original expression "return to the public domain" does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. *Solem*, 104 S.Ct. at 1166.

Our reading of the statutory language of the 1894 and 1897 Acts indicates that there is no explicit language of cession, termination, or any other reference to " the present and total surrender of all tribal interests." *Id.* The provisions of these acts are in sharp contrast to the statutory language in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) where "termination" was found. *See also Mattz v. Arnett*, 412 U.S. 481, 504, 93 S.Ct. 2245, 2257, 37 L.Ed.2d 92 (1973). Secondly, we have not found any language which promises the Indians any certain sum for their lands as in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 591, 97 S.Ct. at 1365.

As in *Solem*, 104 S.Ct. at 1169, the references in the 1894 Act to being in "the public domain" and being "open to entry" do not present "an explicit expression of congressional intent to diminish" the Uncompahgre Reservation. We fully agree with this viewpoint.

The circumstances surrounding the passage of the Acts also fail to establish a clear congressional purpose to disestablish the Reservation. Our reading of the Act's objectives is that they merely opened lands to public entry and failed to extinguish the Reservation.

Our conclusions are first, that the opening of the Uncompahgre Reservation was never formally or informally negotiated between the federal government and the Tribe

of Indians. There was never an understanding on the part of the Tribe that they would lose their reservation as a result of the 1897 Act. The Uncompahgres never bargained for the termination of the exterior boundary of their reservation. For example, in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 584, 97 S.Ct. at 1361 and *DeCoteau v. District County Court,* 420 U.S. 425, 446, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975), the Court found formal negotiation between the tribes and the federal government which resulted in termination. Unlike these earlier cases, the Uncompahgre Indians had no understanding that they were losing their reservation in exchange for a specific benefit.

It is true that the other evidence as to "surrounding events" is ambiguous. The Cities and Counties cite newspaper articles from the period which refer to the Uncompahgre Reservation as the old or former reservation. No particular significance can be given to these articles since they were written from the white settlers' points of view. But these statements do not enjoy any official significance. *DeCoteau v. District County Court,* 420 U.S. at 443, n. 27, 95 S.Ct. at 1092, n. 27.

We agree with the Tribe that the restoration of vacant and undisposed lands in 1948 is suggestive of continued reservation status. *See Mattz v. Arnett,* 412 U.S. 481, 505-06, n. 25, 93 S.Ct. 2245, 2258 n. 25, 37 L.Ed.2d 92. The conclusion to be drawn is that the surrounding events concerning the 1894 and 1897 Acts are ambiguous. They provide no substantial and compelling evidence of a congressional intention to diminish Indian lands. *Solem,* 104 S.Ct. at 1167. The inconclusive nature of this evidence leads us to the conclusion of *Solem:* "We are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and the the old reservation boundaries survived the opening." *Id.* at 1167 (citations omitted). Therefore, we hold that the Uncompahgre Reservation has not been disestablished or diminished.

In summary, we conclude that there are no explicit references to boundary changes and disestablishment in the language of the 1894 or 1897 Acts. We also conclude that there is no evidence of a widely-held understanding on the part of the affected Tribe that the Uncompahgre Reservation would be disestablished.

IV.

CONCLUSION

In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations. We reverse the district court holding insofar as it found the Uncompahgre Reservation disestablished and the Uintah Reservation diminished by the withdrawal of the forest lands. In all other respects we affirm the district court's decision.

SEYMOUR, Circuit Judge, with whom HOLLOWAY, Chief Judge, and McKAY and LOGAN, Circuit Judges, join, concurring.

I concur in Judge Doyle's opinion holding that Congress did not disestablish either the Uintah Reservation, in whole or in part, or the Uncompahgre Reservation. The views expressed by both Judge Doyle and the district court in *Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981), amply support this conclusion with respect to the Uintah Reservation as a whole. However, the district court held that Congress had extinguished that portion of the Uintah Reservation designated as a forest reserve, and all of the Uncompahgre Reservation. I write separately from Judge Doyle to amplify those points I find critical to his conclusion that the district court erred in this respect.

I.

UNCOMPAHGRE RESERVATION

The claim that Congress has never disestablished the Uncompahgre Reservation poses a difficult analytical problem. Although both the district court and the panel decided that the reservation had been disestablished, neither court had the advantage of evaluating the issue in light of *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). *Solem* is particularly helpful in this instance, and a review of its premises will assist our analysis.

Solem recognizes that Congress passed a number of surplus land acts at the turn of the century, in response both to pressure for new land and to the prevailing view that Indians should be assimilated into American society through transition to a private agrarian economy. *See Solem*, 104 S.Ct. at 1164. The land acts were intended to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.[1] *Id.* Because each of these land acts was "the product of a unique set of tribal negotiation and legislative compromise," *id.*, each act must be construed independently to determine whether it resulted in actual disestablishment or diminishment of a reservation.

This task is complicated by Congress' failure to distinguish between property interest, i.e., or title to the land in question, and reservation status. During the relevant period, ownership of the land and its assets provided the

[1] The General Allotment Act of 1887, ch. 119, 24 Stat. 388, gave the President discretion to allot reservation lands to resident Indians and, with tribal consent, to sell surplus lands. A transitional act, it maintained the reservation system but tried to facilitate the allotment process. The Act envisioned the abolition of the reservation system only after this process was complete. *See Mattz v. Arnett*, 412 U.S. 481, 496-97, 93 S.Ct. 2245, 2253-54, 37 L.Ed.2d 92 (1973). Congress later enacted specific legislation to assure the opening of a particular reservation. *Id.* at 497, 93 S.Ct. at 2254.

focus of congressional interest. *See, e.g.*, 30 Cong.Rec. 816-40 (1897) (LD 45).[2] "Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 104 S.Ct. at 1165 (citing Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151)). Consequently, allotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status. *See Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 2254, 37 L.Ed.2d 92 (1973).

Moreover, at the turn of the century, members of Congress assumed that Indians would eventually be assimilated and the reservation system then dismantled. They were therefore less concerned with the effect of a statute on reservation boundaries than in opening the land to non-Indians. *Solem*, 104 S.Ct. at 1164-65. This expectation never came to pass, but it contributed to the ambiguity of certain statutory language and the anticipated effect of that language. These considerations are essential in evaluating the Tribe's claim.

With this context in mind,[3] *Solem* directs us to look to the language of the particular act and the circumstances underlying its passage to determine whether Congress clearly evinced an intent to change boundaries. *Id.* at 1165-66. Appropriately, the most probative evidence of congres-

[2] The record on appeal includes a Joint Compendium of Legislative Documents including Executive Orders, Presidential Proclamations, and certain Secretarial Orders, compiled and used by the district court. *See* Rec., vol. XI, XII. In addition to formal citation form, these sources are referred to parenthetically by their corresponding compendium index numbers, LD 1 to LD 217.

[3] *Solem* cautions that the Court has "never been willing to extrapolate from this expectation [of demise of the reservation system] a specific congressional purpose of diminishing reservations with the passage of every surplus land act." *Solem*, 104 S.Ct. at 1165. Nor will diminishment be "lightly inferred." *Id.* at 1166.

sional intent is the statutory language used to open Indian lands. *Id.* at 1166. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* Explicit language of cession is not, however, a prerequisite for a finding of diminishment. When such language is missing, we must determine whether "events surrounding the passage of a surplus land act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—*unequivocally* reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* (emphasis added).

The first surplus land act which pertains to the Uncompahgres was adopted in 1894. *See* Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38 (LD 35). The Act provided for allotment of land to the Indians for which they would be required to pay. The Act further provided that unallotted land, i.e., land considered either unsuitable or unnecessary for the Indians' needs, "shall, by proclamation, be restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *Id.* ,§ 20 at 337. Although the district court and the panel viewed this as language of cession, I believe that *Solem* dictates a different result. The act at issue in *Solem* used the term "public domain" in reference to the lands within the purported reservation, as well as the phrase "within the respective reservations thus diminished." *Solem,* 104 S.Ct. at 1168-69. The Court acknowledged that these isolated references might support a finding of diminishment, but found them "hardly dispositive" when balanced against the "stated and limited goal of opening up reservation lands for sale to non-Indian settlers." *Id.* at 1169. The Court further noted that there was "considerable doubt as to what Congress meant in using these

phrases . . . [since] unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.* at 1169 n. 17 (citations omitted).

Ultimately, I interpret *Solem* to hold that "public domain" language standing alone is insufficient to support a finding of explicit congressional intent to disestablish. In the case before us the ambiguity of the term is only heightened by its subsequent exclusion from the 1897 Act. *See* Act of June 7, 1897, ch. 3, 30 Stat. 62 (LD 49). Much of the text of the 1894 Act vanished in the 1897 Act, the act that actually succeeded in opening the reservation.[4] The operative phrase which used the term "public domain" was replaced by the following:

> "[A]ll the lands . . . not theretofore allotted in severalty to said Uncompahgre Utes shall . . . be *open for location and entry under all the land laws of the United States;* excepting . . . all lands containing gilsonite, asphalt, elaterite, or other like substances."

Id. at 87 (emphasis added). The panel and the district court equated this language with the earlier "public domain" language. Prior to *Solem,* "public domain" language could have been construed as more conclusive evidence of disestablishment; following *Solem,* the term must be viewed as ambiguous in portent, especially since the change in the 1897 Act reveals Congress' preoccupation with title to the opened lands. As *Mattz* reminds us, under these surplus land acts, allotment is entirely consistent with continued reservation status. *Mattz,* 412 U.S. at 497, 93 S.Ct. at 2254. More emphatically, "[o]nce a block of land is set

---

[4] The terms of the 1894 Act were never fulfilled and the effort to impose the Act on the Uncompahgres was dropped in 1896. *See* S.Doc. No. 32, 55th Cong., 1st Sess. 2 (1897) (LD 46). The 1897 Act is the critical one before us, and I can see no reason to infer a baseline purpose of disestablishment from the ambiguous terms of the unrealized 1894 Act.

aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 104 S.Ct. at 1166. In this light, we cannot read the operative language of the 1897 Act as an explicit indication of congressional intent to disestablish.

We must therefore consider whether events surrounding the passage of the Act "unequivocally reveal a widely-held, contemporaneous understanding" that the reservation boundaries would be extinguished. *See id.* The Supreme Court has found disestablishment in one case where explicit language of cession was missing. In *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), the Rosebud Sioux Tribe voted in favor of an agreement to cede a portion of their reservation in exchange for a sum certain. Congress then passed a series of bills which incorporated the cession language but slightly altered the compensation provision. Although none of the acts clearly severed the Tribe's interest in the unallotted opened lands, the Court held that the statutory language read in conjunction with the agreement by the Tribe unequivocally demonstrated congressional intent to diminish. *Id.* at 587-88, 97 S.Ct. at 1363-64; *see also Solem,* 104 S.Ct. at 1165-66 n. 10.

We have no such agreement here. In fact, it is clear that the Uncompahgre Tribe vociferously opposed the terms of the 1894 Act, a fact which resulted in the failure of the allotment program. *See, e.g.,* S.Rep. No. 450, 53d Cong., 2d Sess. 1 (1894) ("they have from their long residence upon their present reservation acquired a conviction that the lands belong to them") (LD 27); H.R.Doc. No. 191, 54th Cong., 1st Sess. (1896) (Secretary of Interior response to order asking why the 1894 Act had not been implemented) (LD 39); S.Doc. 32, 55th Cong., 1st Sess. (1897) (relating fact that effort to allot pursuant to 1894

Act ceased in 1896) (LD46).[5] Therefore, other circumstances must unequivocally reveal an intent to disestablish before we can affirm the judgment of the district court.

Legislative reports make clear that Congress perceived no legal obligation to obtain the consent of the Uncompahgres, even though the Supreme Court had not yet decided that Congress could unilaterally disestablish a reservation without Indian consent. *See Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This is so because Congress had been informed that the Uncompahgres were entitled only to temporary occupancy of their reservation until land within the reservation could be allotted in severalty. *See, e.g.,* H.R.Rep. No. 1605, 51st Cong., 1st Sess. 2 (1890); H.R. Rep. No. 660, 53d Cong., 2d Sess. (1894) (LD 30).

The roots of this perception are not exactly clear. Before coming to Utah, the Uncompahgres had occupied a reservation in Colorado. In 1880, they were induced to cede their interest in that reservation and agreed

> "to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah."

Act of June 15, 1880, ch. 223, § 1, 21 Stat. 199, 200 (LD 11). The Act authorized the President to appoint a commission to identify eligible Indians and allot to them land in severalty within the prescribed areas. *Id.,* § 2 at 202-203. The Act further directed the Secretary of the Interior

---

[5] As did congressional debate, negotiations with the Indians focused on whether they would have to pay for their allotments. This requirement was eventually dropped, but the agreement to participate in the allotment program does not imply an understanding that the reservation boundaries would disappear.

to identify "a sufficient quantity of land in the vicinities named . . ., to secure the settlement in severalty of said Indians. . . ." *Id.*, § 3 at 203. Once the Secretary had done so, and the allotment process had been completed, the Act contemplated that "all the lands not so allotted, the title to which is [by this agreement] released and conveyed to the United States, shall be held and deemed to be public lands. . . ." *Id.* Finally, the Act provided that the Indians holding allotments would be subject to the civil and criminal laws of the state or territory in which they resided "with the right to sue and be sued in the courts thereof." *Id.*, § 4 at 204.

Had nothing been done between the date of this agreement and the 1897 Act, it is arguable that the Uncompahgres might have had no *jurisdictional* rights or boundaries. *Compare* F. Cohen, *Handbook of Federal Indian Law*, ch. 1, § D3a, at 34-41 (1982) (indicating definition of Indian country under 18 U.S.C.§ 1151 (1982) may not include unrestricted allotted land) *with id.*, ch. 9, § A3a, at 499 (reservation may be established without formal executive order if administrative action reveals purpose of inducing a tribe to settle in a designated area and subsequent treatment as a reservation). However, two years later, on January 5, 1882, President Arthur established the Uncompahgre Reservation by an Executive Order. (LD 12). Nothing in the 1880 Act required him to do so; in fact, the Secretary and the Commissioner had been empowered to designate appropriate land for allotment. He may have felt obligated to create the reservation simply because no land was "found" or "available" to the Uncompahgres in Colorado. Instead, the Tribe was forced to settle in a barren region of Utah no one else yet wanted, where there were, at most, 10,000 acres of arable land out of the nearly two million acre reservation. Although the 1880 Act spoke only in terms of title to land, the subsequent Executive Order indisputably created jurisdictional rights for the Uncompahgres. It is well settled that

a reservation created by executive order has the identical legal status as one created by Congress. *See Mattz*, 412 U.S. at 492-94, 93 S.Ct. at 2251-53. Moreover, since title and reservation status are not congruent concepts, the 1882 Executive Order in no way interfered with Congress' intent that the Uncompahgres hold no title to the land.[6] It merely provided a reservation within which, until the allotment process was complete, the Uncompahgres had temporary occupancy of the whole.[7]

Following allotment, the lands could be and were opened to public purchase and settlement. Any unallotted land would then be returned to the United States, leaving only individual tribal members with allotments in severalty. *See* Act of June 15, 1880, § 3 (LD 11). But in my view it is clear that this title arrangement did not undermine the jurisdictional boundaries created by the 1882 Executive Order. The end result was an Indian reservation where the Indians held title to their allotted parcels and the remainder of the land was opened to the public.

This analysis is supported by the focus on mineral deposits during congressional debates over the 1897 Act. *See*

---

[6] The order did withhold the land from sale, presumably to permit the completion of the allotment process. The 1894 and 1897 Acts would have been needed in any event to reopen the land for sale to non-Indians. It became clear that the legislation was necessary to spur the stalled allotment process. By the 1890s, Congress was also under pressure to open the land to permit mining interests to enter.

[7] The fact that the Uncompahgres did not own the land within their reservation explains why members of Congress and others considered the Uncompahgres to be in a different position than the Uintahs, who did hold title to the land within their reservation. It also explains why the United States did not have to pay the Uncompahgres for the land subsequently opened to the public. That the Uncompahgres only had temporary occupancy rights within the reservation before they received their allotments, however, does not undermine their claim that the jurisdictional boundaries were never extinguished, given the distinction between title and jurisdiction.

Ute Indian Tribe, 521 F.Supp. at 1104; *see generally* 30 Cong.Rec. 102-08, 712-20, 725, 814-21, 826-33, 1070, 1110-20, 1130, 1208-11, 1245, 1253, 1468 (1897) (LD 45). The reservation was recognized as practically barren and valuable only for its extensive deposits of gilsonite, a mineral previously monopolized by foreign producers. Congress was deeply concerned with providing access to these minerals while preventing monopolization by a few mining interests; hence the provision in both the 1894 and 1897 Acts limiting the number of claims any person could post. Congress was also confused as to the exact nature of the Uncompahgres' interest in the land, as indicated by the remarks of Representative Maguire of California in 1897:

> "Gentlemen say here that these gilsonite deposits are of no value, but the Government experts report that they are of immense value, and the struggle to secure them through the medium of this amendment shows that they are so regarded by the representatives of private interests. I do not care which statement may be true. If the deposits in question be a great body of valuable public property belonging to the citizens of the United States, we ought not to give them away in the manner proposed. If as the gentlemen from Colorado [Rep. Shafroth] has stated, they have no value, then we ought not to disturb the Indians who are now using the lands in which they lie. They should be permitted to use the land as long as it serves their purposes; certainly until another reservation shall be found for them.
>
> It is urged on the one hand that the Indians have title to or at least a vested interest in these lands, and on the other it is denied that they have any such title or interest. Respectable legal opinions have been cited on both sides, showing at least that the question is not free from doubt. Are we, upon ex parte and hasty statements of law and fact, to arbitrarily decide this question against the unrepresented Indians, and

> drive them ruthlessly from this reservation, without even the suggestion that we will not or hereafter provide them with another?"
> 30 Cong.Rec. at 828-29 (LD 45).
>
> These remarks once again reveal Congress' preoccupation with title as well as its general confusion regarding the nature of the Uncompahgres' rights in the reservation. Given such ambiguous circumstances, it is impossible to derive any clear indication of whether Congress intended merely to open the reservation or to disestablish it. Under *Solem,* we are bound to resolve this ambiguity in favor of the Tribe. Judge Jenkins, in his thoughtful opinion, correctly pointed out the lack of congressional statements indicating that the Uncompahgre Reservation was intended to survive the opening, 521 F.Supp. at 1107, but he applied the wrong test in inferring disestablishment from this fact. Explicit congressional intent to alter reservation boundaries must be affirmatively shown.
>
> "When both an act and its legislative history fail to provide *substantial and compelling evidence of a congressional intention to diminish* Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."

Solem, 104 S.Ct. at 1167 (emphasis added).

Undeniably, Congress could be explicit when it chose to be. *See Mattz,* 412 U.S. at 504-505 & n. 22, 93 S.Ct. at 2257-2258 & n. 22. Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip, *see* Act of May 24, 1888, ch. 310, § 1, 25 Stat. 157 (LD 18), and the Strawberry Reservoir Project lands, *see* Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (LD 139); *see also* Act of June 15, 1880, § 1, 21 Stat. 199, 200 (LD 11)

(ceding the Ute Colorado lands to the United States). However, no explicit language of cession can be found in either the 1894 or 1897 Acts or in their legislative history. Moreover, surrounding circumstances do not indicate a widely-held contemporaneous understanding that the *reservation boundaries* would disappear, as opposed to a transfer of the title to the lands. I believe that this is so because Congress truly was not concerned about the implications for the Indians of continued reservation status, because it anticipated the future demise of the reservation system and envisioned no influx of white settlers to that barren region. *See Solem,* 104 S.Ct. at 1164-65. Instead, Congress was concerned solely with title and access to the unique mineral deposits found there.

In addition, the subsequent history of the region does not compel a finding of disestablishment. Few people, Indian or non-Indian, live there today. The character of the area has not changed to such an extent that the reservation has de facto disappeared. *See id.* at 1167. Finally, although *Solem* accords subsequent treatment of the area by the federal government and local authorities "some evidentiary value," *id.*, these later events are not dispositive of congressional intent at the time of opening. Had such events resulted in a dramatic change in the character of a region, they would weigh more heavily. However, the one event that seems irreconcilable with continued reservation status, the 1948 Hill Creek Extension, *see* Act of March 11, 1948, ch. 108, 62 Stat. 72 (LD 187), in no way changed the character of the region. In fact, it preserved its Indian character. Absent such a change, Congress' action fifty years following the opening of the reservation does not alter my previous conclusion.

Accordingly, given the ambiguity of the statutes, congressional confusion concerning the nature of Indian rights within the reservation and how the legislation would affect those rights, the lack of an agreement with the Uncompahgres concerning cession of their interests, and

the lack of change in the character of the land, I believe that Congress never clearly evinced an intention to disestablish the Uncompahgre Reservation boundaries and that the evidence supporting such a conclusion is neither substantial nor compelling.

II.

THE FOREST RESERVE

These same principles support the conclusion that the forest reserve remains within the boundaries of the Uintah Reservation. The 1905 Act provides as follows:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary."

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (LD 105). Assuming the Uintah Reservation was never disestablished, nothing in this paragraph amounts to explicit language of cession or a total surrender of Indian interests. The Act merely contemplated the opening of the reservation to non-Indians and permitted the United States to reserve those lands it wished to withhold from settlement.

I find nothing in this action inconsistent with continued tribal jurisdiction within the forest reserve, even though the laws governing national forests are comprehensive. In 1897, when Congress set forth some of the details of its policy for management of National Forests, *see* 30 Stat. 34-36, it left room for the limited exercise of jurisdiction by the state in which the forest is located. *See* 30 Stat.

36 (1897) (codified at 16 U.S.C. § 480).[8] Thus it is clear that the goals of the national forest system as of 1905, including protection of the watershed, protection of fish and game, and management of timber resources, *see, e.g.*, 30 Stat. 35 (1897); 33 Stat. 872-73 (1905), could be achieved without taking jurisdiction away from Indian Tribes. Consistent with this analysis, the United States has supported the Tribe's claim to the forest reserve throughout this litigation.

This tribal jurisdiction is limited by federal resource management policy. The U.S. Forest Service and other federal agencies such as the U.S. Fish and Wildlife Service participate in managing the land and resources of a national forest. Because these agencies are arms of the United States entitled to sovereign immunity from the Tribe's dictates, the Tribe has no more authority to interfere with federal management of the Uintah forest reserve as a national forest than would the State of Utah. Federal agencies may choose to incorporate tribal or state laws for fishing, hunting, or the like, or they may preempt these laws by promulgating regulations designed to further federal land management policy.

As a practical matter, therefore, Indian tribal jurisdiction over the forest reserve will permit the Tribe to govern its members, but will not greatly affect non-Indians. National forest land that is on an Indian reservation is similar to land that is privately held within a reservation; it is not "land belonging to the Tribe or held by the United

[8] 16 U.S.C. § (1982) provides:

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence . . .; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

States in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557, 101 S.Ct. 1245, 1254, 67 L.Ed. 2 (1981). The Tribe's power to exercise civil authority over non-Indians on such land covers only conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. at 1258.

As Judge Doyle points out, Congress sought to protect Indian interests in the forest lands so reserved and managed. The 1905 Act authorized forest officials to sell as much timber as could be safely harvested and to pay the money to the Utes for fifteen years. The provision only indicates Congress' assumption that the reservation system would be dismantled in the near future. Since we have construed the 1905 Act to open rather than disestablish the Uintah Reservation, this provision does not indicate a present congressional intent to terminate Uintah interests in the forest reserve; indeed, it preserves them. Moreover, Congress recognized that this provision was insufficient to terminate all Indian rights in the land. This fact is indicated by comparing Congress' treatment of a reservoir site in the same Act. The Act authorized the President to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." 33 Stat. 1070. The President did so on August 3, 1905. However, Indian rights were actually terminated only when Congress passed a second statute providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished. . . ." Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (creating the Strawberry Reservoir Project) (LD 139). In contrast, Congress never specifically terminated Indian interest in the forest reserve lands.

In finding diminishment, the district court expressed concern that the presidential proclamation reserving the forest lands, *see* Proclamation of July 14, 1905, 34 Stat. 3116 (LD 107), was made pursuant to a general act au-

thorizing the President to set apart "*public land* bearing forests . . . as *public reservations.*" Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (LD 25) (emphasis added). In light of the earlier discussion of the implications of public domain language under *Solem,* I cannot see that this language alters my analysis. Congress was opening the reservation to public entry, and the United States was exercising its right to choose first from available land. The United States eventually paid for most of the land it had reserved, *see* Act of February 13, 1931, ch. 124, 46 Stat. 1092 (LD 167), and returned the remaining portion to Ute ownership, *see* Act of July 14, 1956, ch. 603, 70 Stat. 546 (LD 203). Since, as established above, such an exchange of title cannot affect reservation status, the term "public reservation" does not require us to conclude that Congress withdrew the forest reserve from the Uintah Reservation.

Nor does the fact that Congress once created a specifically Indian forest reserve compel such a conclusion. In that instance, Congress deferred to Indian management of the forest lands. Here Congress intended the lands to be federally *managed* as part of the existing Uintah Forest Reserve. As noted above, in light of 16 U.S.C. § 480, I see no conflict between federal management of forest land and continued reservation status.

Finally, I am not persuaded by the panel's reliance on *United States v. Gemmill,* 535 F.2d 1145 (9th Cir.), *cert. denied,* 429 U.S. 982, 97 S.Ct. 496, 50 L.Ed.2d 591 (1976), and *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 206 Ct.Cl. 649 (1975). In those cases, creation of a forest reserve was only one of several factors indicating the unambiguous extinguishment of Indian rights.

In sum, I would affirm the district court insofar as it holds that the Uintah Reservation was not disestablished. I would reverse the district court insofar as it holds that the portion of the Uintah Reservation reserved as a forest and the Uncompahgre Reservation were disestablished.

SETH, Circuit Judge, dissenting.

I must respectfully dissent.

These appeals concern the continued existence of the Uncompahgre and Uintah Indian reservations. The Ute Tribe in Utah fashioned a Law and Order Code which purported to exercise jurisdiction over all the lands within the original Uintah reservation created by executive order in 1861 as well as the Uncompahgre Indian reservation created in 1882, both in Utah. The State of Utah and several Utah counties and cities questioned tribal jurisdiction over much of this land arguing that a great deal of the Uintah reservation and the whole of the Uncompahgre reservation had been disestablished and was no longer "Indian Country." (18 U.S.C. § 1151.)

This Ute Tribe (the Uintah, White River and Uncompahgre bands) brought suit for declaratory judgment and injunctive relief, requesting that the present extent of the reservations and of tribal jurisdiction be determined. The trial court heard extensive testimony and performed an exhaustive study of legislative and administrative materials relating to the history of both the Uintah and Uncompahgre reservations. The transcript and the record comprise several thousand pages.

As to the Uintah reservation the trial court decided that the original reservation had been changed by several Acts of Congress directed to particular tracts. Thus Congress had removed a 7,040-acre tract known as the Gilsonite Strip in 1888, had removed 1,010,000 acres of land for National Forest purposes in 1905, and had also withdrawn 56,000 acres of land for a reclamation project in 1910. In 1948 the Uintah reservation was increased by 510,000 acres by the addition of the Hill Creek Extension. Except for these specific Acts of Congress, the trial court held that all lands within the original boundaries of the Uintah reservation remained "Indian Country." The individual al-

lotments to Indians, the public law entries by others and some mineral locations were recognized. These were, however, within the exterior boundaries of the reservation.

The trial court concluded that the Uncompahgre reservation had been disestablished.

The resolution of a dispute such as this involving Indian reservations turns on what Congress intended to accomplish at the time as a legal matter. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *see Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The conclusions of the trial court on this point are persuasive, but are not considered to be findings of fact.

The method of examining legislative history and determining legislative intent in cases concerning Indian reservations has been addressed by the United States Supreme Court in recent times. Four such cases are especially significant to our problem. *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), was decided in 1962 and concerned the Colville Indian reservation. The Court held that the North half of the reservation had been disestablished, but the South half remained in reservation status. The Act of Congress said to have disestablished the North half declared that it should be "vacated and restored to the public domain." 27 Stat. 62, 63. The relevant acts with regard to the South half of the reservation allotted the land pursuant to the Congressional policy expressed in the General Allotment Act of 1887, 24 Stat. 390, but did not contain language of vacation and restoration or the term "public domain." *Seymour,* at 355, 82 S.Ct. at 427. The Court also mentioned subsequent legislative and administrative history of the South half of the reservation to support its conclusion that it was still a reservation. On these grounds the Court held that the South half of the reservation retained its status as Indian Country.

In *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), decided in 1973, the Court held that the Klamath River reservation had not been disestablished. The Court made it clear that the allotment of lands within the reservation to resident Indians was consistent with reservation status and an opening for settlement in addition did not disestablish. Thus a more explicit indication of Congressional intent was necessary to disestablish. However, the Court did not rest its decision on the fact that the unequivocal language of vacation and restoration to the public domain that had been present in *Seymour* was absent in *Mattz.* Clearly the Court was unwilling to suggest that there were any special recitations the absence of which would mean that a reservation continued. In addition to considering the historical background of the reservation and the legislative history, the Court observed that several bills which contained clear language of disestablishment passed the House of Representatives but did not pass in the Senate. The Court interpreted the repeated failure of those bills as a sign of Congressional intent that the reservation continue. Thus the crucial point was not simply that the final Allotment Act for the Klamath River reservation lacked language of disestablishment, but that Congress had never at any state permitted such language to be passed into law. It is important that in *Mattz* the Court stated that an opening of a reservation for settlement did not necessarily disestablish the reservation. This was referred to in the *Rosebud* opinion hereinafter considered. The settlement by Indians and non-Indians was considered to be of benefit to the Indians.

The Court in *Mattz* discussed the subsequent jurisdictional history of the reservation as an illustration for its holding of continued reservation status rather than as a foundation for that holding. No detailed analysis of legislative intent was undertaken at the time of the Acts said to constitute disestablishment for any of these cases.

DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), raised the question of whether the Lake Traverse Indian reservation survived a restoration to the public domain. The Court held that it did not, based also on the express Indian cession of the land. This feature of the *DeCoteau* case has no application to the case at bar but *DeCoteau* is important as to the significance of the phrase "public domain." The Court, in comparing the legislation there in question to other Indian agreements, stated, at 446, 95 S.Ct. at 1094:

> "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.' "

The Court speaks as if a restoration to the public domain settled the matter of disestablishment. The position of the two phrases suggests that "returned to the public domain" is synonymous with "stripped of reservation status." With regard to the question of jurisdictional history, the fact that the State of South Dakota had exercised virtually undisputed jurisdiction over the land was important to the Court's decision.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), is of overriding importance to the determination of the case before us because it is the most recent Supreme Court case on the subject and because it provides a detailed analysis. The facts of *Rosebud* are similar to those of other disestablishment cases. The language on which the Court relies in finding disestablishment of the reservation in *Rosebud* does *not* contain a phrase analogous or similar to "vacated and restored to the public domain" of *Seymour*. *Rosebud* involved unilateral action by Congress rather than cession by the Indians. *Rosebud* lays out what the Court terms some "well-established legal principles." One of these is the general rule that doubtful expressions are to be resolved in favor of the Indians. The Court cautions that the resolution of doubt in favor of the Indians is not to be done by ignoring clear indications of Congressional intent, nor does this method of resolving doubt intrude on the Court's holding in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

The Supreme Court in *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), considered the Cheyenne River Act of May 29, 1908. The Act authorized the Secretary to *sell* portions of the reservation within a described area with the proceeds to go to the benefit of the Indians. The opinion considers the older cases herein referred to but only decided the consequences of the Act authorizing sales. It does not provide direction as to our problem.

In *Lone Wolf* the Court held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty. This eliminated the notion that Congressional action with regard to an Indian reservation nvolved some sort of implied contract. After *Lone Wolf* in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent. This prevailed in *Rosebud* where the Congressional action under discussion was the ratification of an agreement with the Indians. It is significant to our problem that the Court in *Rosebud* held that a beneficial interest retained in the lands opened does not preserve to the reservation its original size and shape.

The guiding consideration in *Rosebud* is, of course, the determination of Congressional intent. The Court said this in *Rosebud:*

> "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be

examined with an eye toward determining what congressional intent was."

Before turning to the application of these considerations, it is important to note one feature of the *Rosebud* analysis. In *Mattz v. Arnett,* as discussed above, the Court rejected the contention that bills passed in one House of Congress but not the other, could be an indicator of Congressional intent. *Rosebud* gives a contrary signal as Congress had failed to ratify a 1901 agreement which would have disestablished the reservation but ratified a similar agreement in 1904. The Court observed that the 1901 agreement would unquestionably have changed the reservation boundaries had it been ratified. The 1904 ratification the Court stated evinced a continuity of purpose and language with the 1901 attempt. Therefore, the 1901 agreement even though not ratified demonstrated "an unmistakable baseline purpose of disestablishment." *Rosebud,* 430 U.S. at 592, 97 S.Ct. at 1366. This line of reasoning modifies *Mattz* in explaining techniques of determining Congressional intent. Under *Rosebud,* if the language of an rlier bill is sufficiently unequivocal, and a later Act can be shown to have accomplished the intended purpose of the first, then the first gains validity as an indicator of Congressional intent even though it did not pass both Houses. This analysis has important application in the case at bar.

In *Rosebud,* as in *DeCoteau,* the assumption of state jurisdiction for many years before the suit arose was clear. All the same, the Court does not rely heavily on that history, but mentions it only after having arrived at a conclusion of disestablishment on the basis of legislative history and statutory construction.

It is clear from the above cases that the controlling factors are, of course, terms of the Act with legislative intent, but we are cautioned against relying on particular statutory language. However, a phrase such as "vacated and restored to the public domain" seems to be a sufficient

though not a necessary factor in disestablishment. *Compare DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), with *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). *DeCoteau* implies that language restoring the reservation to the "public domain" may be enough to constitute disestablishment. The subsequent legislative and administrative history is sometimes used to support an interpretation of an Act. Finally, considerations of jurisdictional history and contemporary opinion on reservation status seem to be relied upon only where they are unequivocal. More often, they are discussed to demonstrate that they are not necessarily contrary to the conclusion already reached on the basis of statutory language and history.

In determining legislative intent it is necessary to consider the legislation in its historical context and not as if it were passed today. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). *Mattz* refers to the "surrounding circumstances." Thus a study of the purpose of any legislation involving the Indians would be incomplete and inaccurate without a consideration of the then prevailing policy on the subject. It is apparent that such policy does not follow an unwavering line, and may not appear in a very obvious way. However, in the case before us there was a very clear and drastic policy change which was put into operation throughout the West in all the larger Indian reservations. This was the General Allotment Act of 1887, 24 Stat. 390. This expressed the policy of replacing the reservations with allotments of a tract of land to each Indian to be owned individually. This was known at the Dawes Act and was introduced by Senator Dawes of Massachusetts. He had been active in groups seeking to improve the life of the Indians.

The Secretary of Interior commented when it was pending as a bill and said in part that it would:

"inspire the Indians with a feeling of assurance as to the permanency of their ownership of the lands they occupy and cultivate; it will give them a clear and legal standing as landed proprietors in the courts of law; it will secure to them for the first time fixed homes under the protection of the same law under which white men hold theirs; it will eventually open to settlement by white men the large tracts of land now belonging to the reservations but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the Western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions."

Report of the Secretary of the Interior, 1880, in serial 1959, pp. 5-6, 12.

Senator Dawes understood the Act to have as its goal the abolition of the reservation system. In addressing the Fifth Annual Meeting of the Lake Mohawk Conference of the Friends of the Indian, Senator Dawes stated:

> "Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian Reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished, the work for which they have been created . . . is all gone. . . . You are not mending this fabric, you are taking it down stone by stone. . . ."

Minutes of the Lake Mohawk Conference, 1887, pp. 12-13.

Thus in the period between 1897 and 1905 when legislation opening the Uncompahgre and Uintah reservations

was passed, the policy embodied by the Dawes Act was in full force and being implemented. "Friends of the Indians" wished to abolish the reservations out of a genuine conviction that such an abolition would contribute to the Indians' welfare. Concurrently with Senator Dawes but separately there were present in a myriad of forms the forces of expansion always seeking the development of the West and especially seeking more land in the West. These forces were likewise effective in Congress at the time here concerned.

We cannot be here influenced by what Congress might have done. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). We must instead decide what Congress in fact did. "[O]ur task here is a narrow one. . . .[We] cannot remake history." *DeCoteau v. District County Court,* 420 U.S. 425, at 449, 95 S.Ct. 1082, at 1095, 43 L.Ed.2d 300 (1975).

The Utes argue that the original Uintah and Uncompahgre reservations exist to their original extent except as to a few relatively small tracts. The two reservations when created contained some 4,000,000 acres. In 1905, when Congress was considering legislation concerning the reservations, there were about 1,440 Utes in the three bands. There are now about 1,500 enrolled members of the tribe. Nearly all of these live on the trust lands (that is on allotments and tracts reserved for tribal use). Federal programs and services appear to be available to all regardless of the outcome of this case.

Under the decision of the trial court the non-Indian towns of Duchesne and Roosevelt are within what were considered to be the reservation boundaries. About 90 percent of the population of a reservation so constituted would live in these towns. Most of the lands opened for settlement are in Duchesne County. About 300 Indians live there, but all are not members of the tribe. No one challenges the Indians' claim to the tracts for grazing set apart

for the Indians and, of course, to the allotments made to individual Indians (about 360,000 acres) nor to the lands restored in the 1940's to the Indians (some 217,000 acres) nor to the Hill Creek Extension of about 500,000 acres. The basic dispute is to the non-Indian owned portions of the original reservations, and the National Forest portion.

Before the present dispute the trust land, the reserves and the allotments were referred to as the "Ute reservation" or the "Uintah reservation," and this explains the occasional use of the terms when additions were made extending the reservation or extending the reservation boundaries.

I. THE UNCOMPAHGRE RESERVATION

The Uncompahgre reservation when established contained about 3,000 square miles and was apparently never occupied by more than several hundred Utes at any time. Most of them by 1905 had moved to the Uintah reservation, and they had taken allotments on that reservation rather than on the Uncompahgre.

In determining the status of the Uncompahgre reservation I am chiefly concerned with two pieces of legislation. The first is part of the Indian Appropriations Act of 1894, which contains this language:

> "Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the territory of Utah, agricultural and grazing lands. . . . Said commissioners shall . . . report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

> . . . .
> "Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress."

Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338.

This Act directs the Secretary to immediately open the unallotted lands, after approval of the allotments to entry. The land reported as unsuitable shall "thereupon" be restored to public domain by proclamation. The use of the then universally recognized term "public domain" in designating the eventual status of the land is of critical importance. The status of "public domain" there demonstrates an intent to disestablish. *See DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Land to be in the "public domain" is inconsistent with reservation status or any particular use status. When public land is designated to be used for a particular purpose the land no longer remains in the "public domain." *Scott v. Carew,* 196 U.S. 100, 25 S.Ct. 193, 49 L.Ed. 403 (1905); *Wilcox v. Jackson,* 13 Pet. 498, 10 L.Ed. 264 (1839). Thus the creation of an Indian reservation or a forest or other particular use from public land removes it from the public domain. *Missouri, Kansas and Texas Ry. Co. v. Roberts,* 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377 (1894); *Leav-*

enworth, Lawrence and Galveston Railroad Co. v. United States, 92 U.S. 733, 2 Otto 733, 23 L.Ed. 634 (1875). The "public domain" is a well-recognized description of the status of the land. It was probably more generally recognized at the time the acts in issue were passed than it is now. It is clear that the creation of an Indian reservation from "public lands" removes the subject lands from the public domain. The return of particular use lands to the public domain involves similar land status concepts, and "public domain" then must have the same meaning as it did before. In *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), the Court held that public domain status and reservation status are mutually exclusive.

Another feature of the 1894 Act is the presence of limitations on "entry" when the land is opened. The Tribe argues with respect to the Uintah reservation that limitations on entry demonstrate that Congress did not intend full public domain status for the land. The opening of the Uncompahgre reservation disproves this theory both in the 1894 Act and in the legislative history of that Act. On the face of the 1894 Act the term "public domain" appears simultaneously with provisions limiting entry. Clearly, Congress did not consider these two things to be inconsistent. The legislative history shows that the purpose of the limitation to homestead and townsite entry was not to permit the Indians to retain control of the land, but was to prevent land speculation. Congress gave a great deal of time and care to trying to prevent the land from being snapped up by speculators. 53 Cong.Rec. 7684 (1894); 53 Cong.Rec. 7258-59 (1894). At no time during these debates was there any discussion to suggest a continuing claim by the Indians. Rather the House debated whether the Indians would be required to pay for their allotted lands, implying that Indian title to the reservation was not secure even in 1894 without some payment. 53 Cong. Rec. 7258 (1894). The proper analysis is that once land has been again placed in

the public domain it is open and free to the application of the public land laws. Congress may then make limitations on entry and location, but these do not change the status of the land.

A final note about the 1894 Act is that it provides that the commission appointed to allot to the Uncompahgres should also attempt to procure the agreement of the Uintah Indians to the relinquishment of their land. Thus as early as 1894, Congress contemplated the allotment and opening of the Uintah reservation. It is difficult to escape the impression that Congress hoped and sought to have allotments made to all the Indians as individuals, and to open the land in the reservations not so allotted under the public land laws.

Thus the 1894 Act, although it did not accomplish the opening of the reservation, persuasively indicates by the use of the term "public domain" that it was Congress' intent to remove this land from the Indian reservation. The power of this phrase is not weakened by any limitations on methods of entry to the land. I therefore conclude that this piece of legislation may be sufficient to demonstrate a "baseline" purpose to disestablish that later legislation carried through. The commission appointed by the 1894 Act failed in its efforts to make allotments to the Uncompahgres and was disbanded in 1896.

In 1897, Congress enacted a provision which made the allotment and opening of the Uncompahgre reservation mandatory. Thus:

> "The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompagre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncom-

pahgre Utes shall, on or after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States, excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances."

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

The analogy to *Rosebud* which I have pursued here is not exact. The 1894 Act was in fact passed by both Houses of Congress, but its execution was not accomplished as we have seen. As an instrument of disestablishment it did not itself mandate the *actual opening* of the reservation, but the lands were to be restored to the public domain. When the lands became public domain they thereby were available under the public land laws to entry and location in the usual manner for all public lands. The "opening" and details for making entries were included in other acts to provide some organization to the expected rush to make entries. Thus the drawings here and at *Rosebud* were provided much like the simultaneous filings of today. Several hundred thousand people appeared for the Sioux drawings.

As the trial court observed, legislative and administrative history supports the conclusion that the Uncompahgre reservation was disestablished. The commission attempted to make allotments *after* the opening date of the 1897 Act as if the land was on a reservation. The Commissioner of Indian Affairs was unsure of the legality of this, as the lands were now in the "public domain." Rept. of the Comm. of Ind.Aff., 1898, JX 108, in H.Doc. No. 5, 55th Cong. 3d Sess. In the next few years, there were concerns that even these allotments might fail, and the Indian agent suggested that these Indians abandon the lands for lands on the Uintah reservation. *See* Letter from Acting Agent Mercer to Comm. of Ind.Aff. of Sept. 9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind.Aff. to Acting

Agent Mercer of July 28, 1903, JX 170. Finally, by 1929, the Bureau of Indian Affairs seems clearly to have taken the position that the Uncompahgre reservation no longer existed. *See* Statement Concerning the Uncompahgre Grazing Reserve, Feb. 6, 1943, JX 451; Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426.

A final point illustrates both that "public domain" language was intended to apply through the 1897 Act to the Uncompahgres and that Congress, at least to some extent, considered the Uncompahgres and the Uintahs together when making law concerning the Indian reservation in Southern Utah. In the 1897 Act, it is expressly provided that the Uncompahgres may be given allotments on Uintah land. In 1902, in dealing with the Uintah reservation Congress again explicitly provided that the Uncompahgres be given allotments on Uintah land. 32 Stat. 245. This 1902 Uintah Act also contained "public domain" language. I do not rely on these connections, but they do provide some indicators of Congressional actions and intentions with regard to the Ute Tribe.

I understand Congress to have intended, and did disestablish the Uncompahgre reservation as concluded by the trial court.

II. THE UINTAH RESERVATION

An Indian reservation was established by President Lincoln in 1861 to encompass the entire valley of the Uintah River within the Utah Territory. This was at the time the Government was attempting to have the Utes of Colorado and New Mexico and others settle in designated areas. The reservation was thus for any Indian. Congress confirmed the reservation in 1864 (13 Stat. 63). This in part said:

"Sec. 2. *And be it further enacted,* That the superintendent of Indian affairs for the territory of Utah

be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." (Emphasis in original.)

The reservation contained about 3,186 square miles or 2,039,040 acres, and may have been established for many more Indians than those who "were induced to inhabit the same."

In the half century following the establishment of the reservation Congress enacted several laws which the counties and cities claim altered substantially the status of the lands initially encompassed within it. The Utes claim the entire reservation as initially created save for two small diminishments, and claim that the legislation did not affect their rights. The counties and cities claim that the legislation enacted between 1888 and 1905 diminished the original reservation by withdrawing acreage on several occasions: to enable mining in the area known as the Gilsonite Strip; to enlarge the Uintah National Forest; and to create an irrigation project along the Strawberry River. The counties and cities also claim that the Acts of Congress in 1902 and in 1905 directed that allotments of lands in the reservation be made to individual Indians and provided that all lands not allotted were restored to the public domain, and thereby were no longer a part of the reservation.

The Gilsonite Strip Withdrawal

The first of the Acts of Congress was directed to a 7,000-acre tract in the reservation. In 1886 a prospector had located mining claims on the Uintah reservation for the mineral gilsonite. The land in question was not then

being used by the Indians for agricultural or grazing purposes. Congress in 1888 passes an Act which mandated that the 7,040-acre "Gilsonite Strip" be "declared to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians, and to sell the land. Approval was secured and some sales made. The proceeds were credited to the Utes. The trial court found, and the parties do not dispute on appeal, that the Gilsonite Strip was removed from the reservation. I agree with this conclusion. The 1888 Act contained a significant restriction on the manner of entry after the lands were restored to the public domain. Thus the lands were to be sold in lots not exceeding one-quarter section in size. The parties do not dispute that this limitation on the manner of the disposition did not affect its removal from the reservation and restored it to the "public domain."

Unallotted Lands

During the 1890's and thereafter there was increasing pressure on Congress and the President to open parts of most of the large Indian reservations in the West to settlement by non-Indians, and also to have the Indians own individual tracts of land for their own betterment. I have mentioned these two movements in this opinion. The literature of the time and the court opinions refer to these as the "familiar forces."

The familiar forces thus sought to remove parts of the Uintah Valley reservation from reservation status and so to permit individual ownership by the Indians and to open it for settlement and mining. Thus in this context, with the recognized policy evidenced by the General Allotment Act, and the opening of other reservations, the Uintah Valley reservation was not an isolated instance where the "familiar forces" brought about changes. The people seek-

ing the changes as a betterment for the Indians were sincere in their views. Many public figures advocated individual ownership by Indians, as indeed did a majority in the Congress and the President. The General Allotment Act must be taken as one example and is a clear and definite expression of the policy. Directions to carry it out were included in many pieces of legislation. This was the dominant feeling and policy of the time, the time when the legislation herein considered was passed. Its intent and purpose must be determined in that context, and not as the policies may now exist. Thus Congress in 1888 (25 Stat. 157) declared that a described portion of the Uintah Valley reservation "is hereby declared to be public lands of the United States and restored to the public domain." The Act provided that the restoration be effective upon ratification by three-fourths of the Indians on the reservation. This ratification was not obtained.

Congress also had commissions appointed to negotiate allotments and cessions of the Uncompahgre and Uintah reservation in 1894, 1897 and 1898.

Then on May 27, 1902 Congress included as part of the Indian appropriations bill a direction that allotments be made to all adult White River and Uintah Utes. This included a provision restoring any unallotted lands of the 1864 Uintah reservation to the "public domain." Act of May 27, 1902, 32 Stat. 245, 263. The provision, in pertinent part, is as follows:

> "That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three,

> on which date all the unallotted lands within said reservation shall be restored to the public domain."

The term "public domain" was used twice more in the later portions of the Act. This was one of several connected acts about which this dispute is centered and the references to "public domain" status for the lands not allotted to individual Indians are very significant to the arguments of the parties and to the position taken by the trial court. Congress thereafter used appropriation acts in 1903, 1904 and 1905 to extend the time for opening and to insert added provisions. This was a series of acts with no express words of amendment and with express repeal of relatively small elements in the prior acts.

The trial court reasoned that the Supreme Court's holding in *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), compelled a finding that the language of the 1902 Act providing that all of the unallotted lands "shall be restored to the public domain" would have disestablished the reservation had the unallotted lands then been opened for settlement. The trial court reasoned, however, that this 1902 Act was so changed by a 1905 enactment that such a result did not come about.

The Utes attempt to distinguish *Seymour* by arguing that this 1902 Act may restore the unallotted lands to the public domain, but there is also needed a provision that the lands be vacated by the tribe before the lands are restored to the public domain. They argue that the cases uniformly provide that *independent* language to indicate that the reservation boundaries would be extinguished or adjusted at the same time that public entry was allowed is necessary to disestablish. They cite *DeCoteau v. District County Court,* 420 U.S. 425, 445-46, 95 S.Ct. 1082, 1093-94, 43 L.Ed.2d 300 (1975) (the express language of cession and relinquishment of reservation lands restored them to the public domain); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (Act of March

2, 1889, § 21, 25 Stat. 896, created six separate reservations from the Great Sioux reservation and "all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain," 25 Stat. at 896); *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) ("vacated and restored to the public domain"); *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913) (Secretary of the Interior to cause the quantity of land allowed Indians remaining on the reservation to be selected in as compact a form as possible, the remainder to be restored to the public domain, Act of July 4, 1884, 23 Stat. 76); *Russ v. Wilkins,* 624 F.2d 914 (9th Cir. 1980) (explicit description of new reservation boundaries, the remainder "restored to the public lands of the United States," 17 Stat. at 634). These cited cases, as indicated by the notes, are however a mixture of statutory provisions, and do not stand for a proposition that a provision vacating the reservation or describing new boundaries is required for disestablishment.

The argument that the operative language of restoration must contain independent language adjusting or extinguishing reservation boundaries is unpersuasive. The Supreme Court has never mentioned such a requirement, *see, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), and I see no reason to impose one now. The trial court was correct in determining that the 1902 Act would have accomplished the disestablishment of the reservation as to unallotted lands had the lands been then opened. An additional factor relative to the 1902 Act was an addition to it providing for a tract of grazing land to be set apart for the common use of the Indians to meet the reasonable need of the Indians. This provision was added by a joint resolution on June 19, 1902 (32 Stat. 744). It in part provided:

> "In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock."

This addition is significant in evaluating the 1902 Act and further demonstrates the status of the reservation lands before the opening.

After the 1902 Act

The Indian consent required by the 1902 Act was not forthcoming within the time limit to make the allotments, and Congress had to take further action. However, the matter was influenced in a very substantial way by the decision of the Supreme Court in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), decided January 5, 1903. The Court there held that Congress could unilaterally change Indian reservations; that no tribal or Indian consent was required; and that there was no contractual relationship between the Government and the tribe arising from the establishment of a reservation. As is apparent, this had significant implications on what Congress was trying to accomplish as to this reservation and as to others.

In another appropriation act Congress by the Act of March 3, 1903 (32 Stat. 982) again extended the time for opening the unallotted lands for entry as provided in the 1902 Act, and eliminated any reference to consent of the Indians.

In 1904, Congress again extended in an appropriation act the time for the opening to March 10, 1905 so that surveying could be completed and allotments made. Act of April 21, 1904, 33 Stat. 189, 207.

The trial court held, and the parties do not dispute on appeal, that the 1903 and 1904 Acts did not affect the operative terms of the 1902 Act. I agree.

The time set by the 1904 Act for allotments to be completed (March 10, 1905) was running out and Congress again used an appropriation act to extend the time. However, there were added this time some new provisions by this Act of March 3, 1905 (33 Stat. 1048). There were provided more details as to the opening of the unallotted lands for entry, and restrictions were added as well which were of significance.

This 1905 Act in part provided:

"That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof;

"That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he

considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation." (Emphasis in original.)

The Relationship of the 1902 and 1905 Acts

This court considered the relationship of the various enactments concerning the Uintah reservation and certain issues regarding the status of the unallotted lands in *Hanson v. United States,* 153 F.2d 162 (10th Cir.). We there concluded that the issue had to be decided under the 1902 Act, and that the 1905 Act merely extended the date of opening of the reservation and did not affect the operative terms of the 1902 Act.

What is advanced as "limitations" on disposition in the 1905 Act is the provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and town-site laws, . . . and shall be opened to settlement and entry by proclamation of the President." The 1905 Act does not specifically utilize or repeat the "public domain" language of the 1902 Act.

The provision that the lands be opened under the homestead and townsite laws does not constitute a substantial restriction which militates against the conclusion that the public domain intent in the 1902 Act was carried over into the 1905 Act. The limitation in the *Rosebud* opening is comparable as is *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913). The provisions considered

in *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), and in *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), do not lead to a contrary conclusion. In the case before us the provisions in the prior acts dictated the public domain conclusion under the 1905 Act.

Nothing in the Congressional debates suggests an attempt to change the 1902 intent. *See* 39 Cong.Rec. 1181-85, January 21, 1905. Rather, Congress was concerned in 1905 with the possibility that land speculators would deprive actual homeseekers of the choicest land. "Indian Appropriations Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess. (1905).

The intent of the 1905 Act was thus to effect the restoration of the unallotted lands to the public domain and to allow entry under the homestead and townsite laws to prevent speculation.

Evidence of this intent can be found in the Committee Report to S. 6867 in 1905, a bill which used language virtually identical to that found in the 1905 Act. There the report included letters from the Commissioner of Indian Affairs and from the Commissioner of the General Land Office which referred to the lands as being in the public domain or as public lands. S.Rep. No. 4240, 58th Cong., 3d Sess. (1905).

It is difficult to accept the argument that limitations on the manner of entry necessarily vitiate Congressional intent to disestablish the reservation in view of the Gilsonite Strip withdrawal herein considered. There, some 7,000 acres were restored to the public domain subject to a limitation on disposition to purchase with a maximum number of acres. As I have noted, neither party disputes that the strip was removed from reservation status. Thus limitations on entry are not necessarily inconsistent with the disestablishment. As mentioned in the *Rosebud* opinion

Congress knew what operative words were needed to accomplish the purpose.

As mentioned, the changes were accomplished by a series of provisions contained in Indian appropriation acts of 1902, 1903, 1904 and 1905. Each act built on the ones before, and especially by "extending" the time for opening from those provided before. This shows a continuous process brought about by the delays encountered on the ground. The acts also did not seek to expressly amend the prior act but, as mentioned, built on the one before. This prevails as to matters other than time "extentions." There were several express repeals, but only as to specific elements which were not of significance. Thus there were no general repeals but only additions of items here of concern. This cumulative series of enactments should be compared to the position taken by the Supreme Court in *Rosebud,* as I have already mentioned. There an agreement that failed to be ratified by Congress in 1901 could be considered in determining the intent of a 1904 Act. The 1904 Act or agreement indicated continuity of purpose and language with the 1901 attempt. The 1901 agreement showed "an unmistakable baseline purpose of disestablishment." *Rosebud,* at 592, 97 S.Ct. at 1366. This same demonstration of continuity is present in the case before us and the 1902 Act does also show a "baseline purpose of disestablishment." Again, the persuasiveness is greater here because the earlier language was in acts that passed both Houses and not in bills that failed.

Even if it were not clear from the terms of the 1905 Act and its legislative history that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, 39 Cong.Rec. 3868, 3919, 39 Cong.Rec. 1181-83, the contemporaneous and subsequent legislative and administrative treatment of the unallotted lands confirms that they were part of the public domain.

The most important indication of the effect of the 1905 Act is President Roosevelt's Proclamation of July 14, 1905 which stated, in relevant part:

> "Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre'.
>
> "And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> . . . .
>
> "Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . . ."

Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3119.

The lands were to be opened by a presidential proclamation, and of great significance in any determination of the intent of Congress is the executive implementation of the legislation. The proclamation is very similar in all significant respects to the *Rosebud* proclamation. This proclamation, with its references and adoption of terms from the 1902 Act, in my view demonstrates the continuation of the 1902 provisions, and confirms the public domain status of the unallotted lands. The proclamation is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the reservation. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 602-03, 97 S.Ct. at 1371-72.

A further indication that the unallotted lands were no longer part of the reservation after it was opened is the subsequent restoration of some of those lands to reservation status for the Utes. Much if not all of the unallotted lands on the original Uintah reservation which had not been disposed of under the public land laws were restored in 1945. The Order of Restoration recites that "pursuant to the provisions of the act of May 27, 1902 (32 Stat. 263)" the unallotted lands were made subject to disposal under the laws applying to public lands. As indicated this restoration acknowledges that the opening was under the 1902 Act. Section 3 of the Reorganization Act provides that the Secretary of the Interior is authorized "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened." Act of June 18, 1934, 73rd Cong., 2d Sess., § 3. Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. I agree. This restoration included about 217,000 acres.

Much later administrative treatment of the unallotted lands also confirms the proposition that those lands were restored to the public domain. *See, e.g.,* Opinion of the Solicitor of the Department of the Interior, January 27,

1947, 59 I.D. 393 (unallotted lands were "restored to the public domain pursuant to the Act of May 27, 1902, as amended. . . . Although the lands were restored to the public domain, they were subject to disposition only under the Act of May 27, 1902, as amended." *Id.* at 393, 394); Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, June 19, 1941.

The largest single addition occurred in 1948 when Congress added the Hill Creek Extension of some 510,000 acres of the former Uncompahgre reservation to the Uintah and Ouray reservation. Act of March 11, 1948, ch. 108, 62 Stat. 72.

I have also examined the maps introduced by the parties and the governmental statistics setting forth the acreage of the reservation and find them to support the position taken by the counties and cities. Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties were reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.") The statistics of the Office of Indian Affairs show similar figures.

Both parties have introduced substantial evidence regarding administrative and legislative appellations to the "current" or "former" status of the reservation. My review of those references evinces no discernible Congressional intent one way or the other. There is simply no

consistent, clear and uniform identification of the reservation's status in the subsequent legislative record. Analysis of the newspaper accountings of the events occurring on the reservation is similarly opaque.

Thus, after closely examining the record as it relates to the unallotted lands, I must conclude that the trial court erred in holding that the unallotted lands were not returned to the public domain pursuant to the 1902 Act.

Other Issues—Pre-opening Withdrawals
Forest Reserve Lands

Besides extending the time of entry under the 1902 Act and describing the entry thereunder, the 1905 Act also provided that before the opening the President was authorized to set apart and reserve lands in the reservation as an addition to the Uintah Forest Reserve. 33 Stat. 1070. Specifically, the Act states:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest resreves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary. . . ."

By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the Uintah reservation for that purpose. Proclamation of July 14, 1905, 34 Stat. pt. 3, 3116. The reserve was created pursuant to specific authority under the 1905 Act and the general authority he already had.

The trial court found that the presidential forest reserve proclamation extinguished those portions of the reservation included therein. On appeal, the Utes argue that the statutory language of the 1905 Act and the contemporaneous legislative history did not extinguish the reservation bound-

aries nor did Congress ever enact subsequent legislation to extinguish the Utes' title. In the proclamation creating the forest reserve out of the reservation lands it was expressly provided that the reserve be an addition to the Uintah Forest Reserve which theretofore existed. The addition was to be "subject to the laws, rules, and regulations governing forest reserves."

My review of the 1905 Act, the presidential proclamation, the pertinent legislative history and the subsequent treatment of the subject lands convinces me that the forest reserve lands are not part of the reservation. No express language of termination of Indian jurisdiction over the Forest Service lands or an express extinguishment of the reservation boundaries was required. As I noted previously the Supreme Court has held that the "clear language of express termination" is not a required talisman for termination or disestablishment. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 588 n. 4, 97 S.Ct. 1361, 1364 n. 4, 51 L.Ed.2d 660 (1977). The authority was present and was exercised to so change the land status from reservation lands to public forest reserves. The administrative authority over the lands was transferred from the Secretary of the Interior to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected the Forest Service lands to an entirely different regulatory regime. By transferring of reservation status to the status of the Forest Service lands thus for public use and by shifting the administrative authority over them, Congressional intent to remove the lands from the reservation is clearly evidenced.

My view that Indian jurisdiction is inconsistent with the land's status as forest reserve land is consonant with recent holdings by the Court of Claims and the Ninth Circuit. Both courts held that the designation of land as a forest reserve is itself effective to extinguish Indian title. *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1386, 1391-93, 206 Ct.Cl. 649 (1975); *United States v. Gemmill,*

535 F.2d 1145 (9th Cir. 1976). The Ninth Circuit went on to find that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the . . . Indians for these lands." *Id.* at 1149. The Utes received $1,217,000.00 in compensation. The situation before us is very similar as Congress added to a forest reserve by removing lands from an Indian reservation and later compensating the Indians for the lands. The trial court was correct in finding that the 1,010,000 acres withdrawn pursuant to the July 14, 1905 presidential proclamation were no longer part of the Uintah reservation.

The Strawberry River Reclamation

The third major part of the 1905 Act authorized the President before the reservation was opened to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." President Roosevelt withheld from disposal 56,000 acres along the Strawberry River for reclamation purposes pursuant to that authority in August 1905. Presidential Proclamation of August 3, 1905, 34 Stat. pt. 3, 3141.

Five years later, Congress compensated the Utes for the Strawberry River lands and clearly extinguished any Indian interest in the lands by providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished, and the title, management and control thereof shall pass to the owners of the lands irrigated from said project. . . ." Act of April 4, 1910, 36 Stat. 269, 285.

Neither side disputes the trial court's holding that the reservation was diminished to the extent of the 56,000-acre Strawberry River withdrawal.

The withdrawal of lands for the Strawberry River irrigation project does not give rise to any implication that the unallotted lands remained part of the reservation. The Strawberry River lands were set apart and reserved on August 3, 1905, over three weeks *prior* to the opening of the reservation on August 28, 1905. Affirmative action to remove the Strawberry River lands from the reservation was then necessary because the reservation had not yet been opened. The Strawberry River withdrawal has no bearing on the status of lands which were subsequently to be opened to the public domain.

I must repeat that these issues must be considered in the context of the aims of Congress at the time the legislation was enacted, and what was *then* sought to be accomplished. It is easy to apply later views and policies, but this should not be done. The then prevailing aims and purposes are well documented in the legislative history, and we should not now seek to apply current standards. Also, the application of then established public land law and the prevailing use and meaning of its terms are essential.

CONCLUSION

I would:

1. Affirm the trial court's holding that the original Uncompahgre reservation was disestablished by Congress pursuant to the Act of June 7, 1897 and no longer exists.

2. Affirm the trial court's holding that prior to August 28, 1905, the original boundaries of the Uintah Valley Indian reservation were diminished by Congress through the withdrawal of the Gilsonite Strip in 1888, by the withdrawal of 1,010,000 acres subsequently made part of the Uintah National Forest, and by the withdrawal of approximately 56,000 acres for the Strawberry River irrigation project.

3. Affirm the trial court's finding that the 510,000-acre Hill Creek Extension was incorporated within the Uintah and Ouray Indian reservation.

As to the Uintah Valley reservation, I would reverse the holding of the trial court that the unallotted lands at the opening remained part of the reservation. Instead it is my view that the then unallotted lands lost all reservation status, became part of the public domain, and were not within the reservation for any purpose when the reservation was opened, subject only to the special tracts herein discussed set apart for specific uses before the land was opened, and subject to valid mineral claims specifically provided for in the Acts of 1902, 1903, 1904 and 1905 and valid claims made under the general mining laws.

BARRETT, Circuit Judge, joins in this dissenting opinion.

United States of all the lands within said reservation not allotted or needed for allotment as aforesaid. The agreement for such cession shall be reported by said commission and become operative when ratified by Act of Congress; and thereupon such ceded lands shall be held in trust by the United States for the purpose of sale to citizens thereof: *Provided*, That the United States shall pay no sum or amount whatever for said lands so ceded. Said lands shall be sold in such manner and in such quantities and for such prices as may be determined by Congress: *Provided*, That the amounts so received shall, in the aggregate be sufficient to pay said Indians in full the amount agreed upon for said lands. All sums received from the sales of said lands shall be placed in the Treasury of the United States for said Indians, and shall be exclusively devoted to the use and benefit of the Indians having interests in the lands so ceded.

—ratification, etc.

Provisos. Payment. Sale.

Aggregate amount from sales, etc.

SEC. 3. That said commissioners shall receive six dollars per day each, and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk to be selected by them, whose compensation shall be fixed by said commissioners, subject to the approval of the Secretary of the Interior: *Provided*, That the cost of executing the provisions of this Act shall not exceed the sum of five thousand dollars, which sum is hereby appropriated for that purpose, out of any moneys in the Treasury not otherwise appropriated.

Pay of commissioners. —clerk.

Proviso. Limit for expenses, etc.

~~Approved, June 4, 1898.~~

---

9. Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82:

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of

Uintah and White River Utes.

Allotment of irrigable land.
Post, pp. 744, 997.

the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys

Unallotted lands restored to public domain.
Provisos.
Homestead entries.
Mineral leases.

Raven Mining Company.

Application of proceeds from sales.

Post, p. 745.

in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Payments to Indians.
Vol. 30, p. 87.
Post, p. 744.

* * * *

10. Joint Resolution of June 19, 1902, No. 31, 32 Stat. 744, I Kapp. 799-800 (2d ed. 1904), LD 85:

June 19, 1902.
[Pub. Res., No. 31.]

[No. 31.] Joint Resolution Supplementing and modifying certain provisions of the Indian appropriation Act for the year ending June thirtieth, nineteen hundred and three.

Indian appropriation act.
Corrections.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act "Making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other

purposes," are hereby supplemented and modified as follows:

Spokane Indian Reservation, Wash.

The Secretary of the Interior is directed to make allotments in severalty to the Indians of the Spokane Indian Reservation in the State of Washington, and upon the completion of such allotments the President shall by proclamation give public notice thereof, whereupon the lands in said reservation not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

Land not allotted open to purchase, etc.
Ante, p. 266.

Walker River Indian Reservation.

Nonirrigable grazing lands.
Ante, p. 260.

In addition to the allotment in severalty of lands in the Walker River Indian Reservation in the State of Nevada, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Uintah and White River Utes.

Nonirrigable grazing lands.
Ante, p. 263.
Post, p. 997.

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Uncompahgre Indians.

Allotments confirmed to agricultural lands.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to

each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

Grazing lands.
Ante, p. 264.

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Allotments in severalty to Indians outside Indian Territory.
Vol. 24, p. 388.
Ante, p. 260.

The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

Approved, June 19, 1902.

---

11. Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-998, III Kapp. 14, 17-18 (1913), LD 91:

To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the pur-

Walker River Indi-

pose of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however,* That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further,* That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further,* That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

ans, Nev.
Uintah and White River Utes, Utah.
Survey, etc., of irrigable lands.
32 Stat., 260, 742.
Vol 1, p. 751, 799.

32 Stat., 998.

Proviso.
Obtaining consent to allotment.
1904, ch. 1403, 33 Stat., 207, post, p. 53.

Grazing lands.
Restriction.
1905, ch. 1479, 33 Stat., 1069, post, p. 146.

Unallotted lands.
Time of opening in settlement extended.
32 Stat., 251, vol. 1, p. 732.

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location, and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed

Uncompahgre Indian Reservation.

Mining claims located on, prior to January 1, 1891, valid.

30 Stat., 87, vol. 1; p. 621.

Patents to issue on relocations, etc., of claims.

Claims located after January 1, 1891, invalid.

Sale of remainder of mineral lands.

Restrictions.

in a proclamation of the President of the United States issued for that purpose not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Balance of lands reserved.

* * * *

12.Act of April 21, 1904, Ch. 1402, 33 Stat. 189, 207-208, III Kapp. 35, 53 (1913), LD 94:

Uintah Reservation, Utah.
Time of opening unallotted lands extended.
1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.
1903, ch. 994, 32 Stat., 998, ante, p. 18.
1905, ch. 1479, 33 Stat., 1069, post, p. 146.
33 Stat., 208.

That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

* * * *

13.Act of March 3, 1905, ch. 1479, 33 Stat, 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:

Uintah Reservation Utah.

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands

Restriction on grazing lands repealed.
1902, J.R. 31, 32 Stat., 744, vol. 1, p. 799.
1903, ch. 994, 32 Stat., 998, ante, p. 17.

to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

Unallotted lands.
Time extended for opening, to entry.
1904, ch. 1402, 33 Stat., 207, ante, p. 53.
1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act

Provisos.
Soldiers' and sailors' rights.
R. S. secs. 2304, 2305.
33 Stat., 1070.

of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

Sale of remaining lands.

Proceeds of sale.

1902 ch. 888, 32 Stat., 263, vol. 1, p. 753.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

Uintah Forest Reserve.

Additional land reserved.

32 Stat., 263.

Reservoir site.

Proviso.

Proceeds of timber sales.

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in

Raven Mining Co.

Certificate of location of claims, etc.

the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall

1902, ch. 888, supra.

Patent to.

Provisos.

Florence Mining Co.

Certificate of locations of claim.

Patent to.

Right of ingress, etc.

have the right of ingress and egress to and from their respective properties over and through said reservation.

* * * *

14. Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602 (1913), LD 107:

July 14, 1905. Proclamations, 34 Stat., Part 3, 3116.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Uintah Forest Reserve, Utah. Preamble. 29 Stat., 895. 26 Stat., 1103. Proclamations, 34 Stat., pp. 200-201.

WHEREAS, the Uintah Forest Reserve, in the State of Utah, was established by proclamation dated February twenty-second, eighteen hundred and ninety-seven, under and by virtue of section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", which provides, "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

33 Stat., Part I, 1070.

And whereas, it is provided by the Act of Congress, approved March third, nineteen hundred and five, entitled, "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," that "before the opening of the Uintah Indian Reservation the President is hereby authorized to set

apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary";

And whereas, it is considered necessary for the public good that certain lands in the Uintah Indian Reservation be set apart and reserved as an addition to the Uintah Forest Reserve;

Lands added to forest reserve from Uintah Indian Reservation.

Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by the aforesaid act of Congress, approved March third, nineteen hundred and five, do hereby make known and proclaim that certain lands in the said Uintah Indian Reservation are hereby added to and made a part of the Uintah Forest Reserve, and that the boundary lines of the said forest reserve are, accordingly, so changed and extended as to read as follows:

Description.

Beginning at the north-west corner of Township one (1) South, Range seven (7) East, Salt Lake Meridian, Utah; thence easterly along the Base Line to the south-west corner of Township one (1) North, Range nine (9) East; thence northerly to the north-west corner of said township; thence easterly to the south-west corner of Township two (2) North, Range fourteen (14) East; thence northerly to the north-west corner of said township; thence easterly to the middle of the channel of the Green River; thence in a general south-easterly direction along the middle of the channel of said river to the range line between Ranges twenty-two (22) and twenty-three (23) East; thence southerly along the range line, allowing for the proper offset on the Base Line, to the south-east corner of

Township two (2) South, Range twenty-two (22) East; thence westerly to the north-west corner of Township three (3) South, Range nineteen (19) East; thence southerly to the eastern boundary of the Uintah Indian Reservation; thence north-westerly along said Indian reservation boundary to the section line between Sections twenty-one (21) and twenty-eight (28), Township two (2) North, Range one (1) East, Uintah Meridian; thence westerly to the south-west corner of Section nineteen (19), Township two (2) North, Range one (1) West; thence northerly to the south-east corner of Section thirteen (13), Township two (2) North, Range two (2) West; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of Section twelve (12), said township; thence westerly to the south-west corner of Section four (4), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section four (4), Township two (2) North, Range three (3) West; thence southerly to the south-east corner of Section thirty-three (33), said township thence westerly to the north-east corner of Township one (1) North, Range six (6) West; thence southerly to the south-east corner of Section thirteen (13) said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said section; thence westerly to the south-west corner of Section eleven (11), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section eight (8), said township; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the north-east corner of Section twenty-one (21), Township one (1) North, Range nine (9) West; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section nineteen (19), said township; thence southerly along the range line, allowing for the proper offset on the Base Line, to the north-west corner of Section eighteen (18), Township one (1) South, Range nine (9) West; thence easterly to the north-east corner of Section sixteen (16), Township one (1), South, Range eight (8) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Section four (4), Township two (2) South, Range ten (10) West; thence southerly to the south-east corner of Section sixteen (16), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Township two (2) South, Range eleven (11) West; thence westerly to the south-west corner of Section thirty-three (33), said township; thence northerly to the south-east corner of Section twenty (20), said township; thence westerly to the south-west corner of said section; thence northerly to the south-east corner of Section seven (7), said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said township; thence westerly to the north-east corner of fractional Section four (4), Township two (2) South, Range twelve (12) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence easterly to the north-east corner of Section three (3), Township three (3) South, Range twelve (12) West; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section eleven (11), said township; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section thirteen (13), said township; thence southerly to the south-east corner of Township four (4) South, Range twelve (12) West; thence easterly to the south-west corner of Section thirty-three (33), Township four (4) South, Range

Uintah Forest Reserve—Continued.

eleven (11) West; thence northerly to the north-west corner of said section; thence easterly to the south-west corner of Section twenty-five (25), said township; thence northerly to the north-west corner of said section; thence easterly to the north-east corner of Section thirty (30), Township four (4) South, Range ten (10) West; thence southerly to the south-east corner of Section thirty-one (31), said township; thence easterly to the southwest corner of Township four (4) South, Range nine (9) West; thence northerly to the north-west corner of Section thirty (30), said township; thence easterly to the north-east corner of Section twenty-five (25), said township; thence southerly to the south-east corner of said township; thence easterly to the north-east corner of Section five (5), Township five (5) South, Range eight (8) West; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Section twenty-four (24), Township five (5) South, Range nine (9) West; thence westerly to the north-east corner of Section twenty-eight (28), said township; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section twenty-nine (29), said township; thence southerly to the north-west corner of Section twenty-nine (29), Township six (6) South, Range nine (9) West; thence easterly to the south-west corner of Section twenty-one (21), Township six (6) South, Range eight (8) West; thence northerly to the north-west corner of Section four (4), said township; thence easterly to the eastern boundary of the Uintah Indian Reservation; thence in a general south-westerly and north-westerly direction along said Indian reservation boundary to the range line between Ranges six (6) and seven (7) East, Salt Lake Meridian; thence northerly to the north-west corner of Township

one (1) South, Range seven (7) East, the place of beginning; such of the above-named corners as have not been established by the official surveys being intended to be located at the points where such corners would fall in projecting the surveys in the directions indicated without allowing for any irregularities which may occur in actually extending the surveys;

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made. Lands excepted.

Warning is hereby expressly given to all persons not to make settlement upon the lands reserved by this proclamation. Reserved from settlement.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth. [SEALED]

By the President: THEODORE ROOSEVELT

ALVEY A. ADEE

Acting Secretary of State.

15. Presidential Proclamation of July 14, 1905, 34 Stat., 3119, III Kapp. 605 (1913), LD 108:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
A PROCLAMATION.

July 14, 1905.
Proclamations.
34 Stat., Part 3, 3119.
Uintah Indian Reservation, Utah.
Preamble.
32 Stat., 263.

Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre".

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

32 Stat., 998.
33 Stat., 207.
33 Stat., 1069.

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in

which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish war or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States; and it is further directed and prescribed that:

Unallotted lands on reservation opened to entry, etc., Aug. 28, 1905.

Commencing at 9 o'clock a.m. Tuesday, August 1, 1905, and ending at 6 o'clock p.m. Saturday, August 12, 1905, a registration will be had at Vernal, Price and Provo, State of Utah, and at Grand Junction, State of Colorado, for the purpose as ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to

Places of registration.

show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration cannot be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress, approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank form provided by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Applications.

R.S., sec. 2304, p. 422.

31 Stat., 847.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands and then only in pursuance of a homestead entry duly allowed

Certificate of registration.

Restrictions.

by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Provo, Utah, commencing at 9 o'clock a.m., Thursday, August 17, 1905, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by

Drawings.

the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Applications.

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

Certificates of registration.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Payments.

Persons who make homestead entry for any of these lands will be required to pay therefor at the rate of one dollar and twenty-five cents per acre when they make final proof, but no payment, other than the usual fees and commissions will be required at the time the entry is made.

Nonmineral affidavits.

Persons who apply to make entry of these lands prior to October 27, 1905, will not be required to file the usual nonmineral affidavit with their applications to enter, but such affidavit must be filed before final proof is accepted under their entries; but all persons who make entry after that date will be required to file that affidavit with their applications to enter.

Entries.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appears that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Townsites.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are needed for townsite purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

Entry of undisposed-of lands.

All persons are especially admonished that under the said act of Congress approved March 3, 1905, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in

like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

Regulations.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington this 14th July, in the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] THEODORE ROOSEVELT

BY THE PRESIDENT:
ALVEY A. ADEE
Acting Secretary of State.

~~16. Presidential Proclamation of July 31, 1905, 34~~ Stat., pt. 3, 3139, III Kapp. 609 (1913), LD 110:

BY THE PRESIDENT OF THE UNITED STATES. A PROCLAMATION

July 31, 1905.
Proclamations.
34 Stat., Part 3, 3139.
Uintah Indian Reservation, Utah.
Preamble.

Whereas, on June 7, 1905, the Secretary of the Interior directed the Commissioner of Indian Affairs to cause to be selected, by the Uintah Allotment Commission, one or more tracts of land, suitable for townsite purposes, in the Uintah Indian Reservation Lands, State of Utah, to the end that the same might be reserved

APPENDIX E

Dennis L. Draney, #913
DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P. O. Box 206
Duchesne, Utah 84021
(801) 738-2624

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	STIPULATION
vs.	)	
	)	
CLINTON PERANK,	)	
	)	
Defendant/Apppellant.	)	Case No. 860243

COME NOW the parties, by and through their respective counsel pursuant to the Order of the District Court, and stipulate that the record in the case of the Ute Indian Tribe vs State of Utah, et al, case numbers 81-1827 and 81-1909, Tenth Circuit Court of Appeals, may be part of the record in this case for the purpose of determining the boundary issue herein.

DATED this 8th day of October, 1986.

/s/ Dennis L. Draney
Attorney for Plaintiff/Respondent

/s/ Kirk C. Bennett
Attorney for Defendant/Appellant

No. 92-6281
IN the SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1992

ROBERT P. HAGEN,	)	
	)	
PETITIONER,	)	
vs.	)	STIPULATION
	)	OF RECORD
STATE OF UTAH,	)	
	)	
RESPONDENT.	)	

COMES NOW the parties, by and through their respective counsel, and hereby stipulate as follows:

1. That pursuant to a stipulation between the parties in State v. Perank, No. 860243, decided by the Utah Supreme Court, July 17, 1992, a copy of which is attached hereto, the designated record in Ute Indian Tribe v. State of Utah, et al., 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986), was made part of the record in State v. Perank, and together with all appellate briefs, the same being submitted and forwarded to Utah Supreme Court, together with a cover letter, a copy of which is attached hereto.

2. That in this case, State v. Hagen, No. 910017, 191 Utah Adv. Rep. 26, ___ P.2d ___ (1992), cert. pending, No. 92-6281, the Utah Supreme Court expressly held that its decision in Perank, decided the same day, resolved the same issue here.

3. That the record as set forth above shall also constitute the record in State v. Hagen.

R. Paul Van Dam
Utah Attorney General

/s/ Michael M. Quealy
Michael M. Quealy
David B. Thompson
Assistant Attorneys General
1636 West North Temple, #300
Salt Lake City, Utah 84116
Counsel for Respondent

/s/ Joel Berrett
Joel D. Berrett
P.O. Box 262
Roosevelt, Utah 84066
Counsel for Petitioner